Index.

Nature and Result of Suit 1- 9
Findings of fact by the Court and Recital of Evidence 9- 19
Assignments of Errors 20- 23

PROPOSITION 1.

ERROR OF TRIAL COURT AND CIRCUIT COURT OF APPEALS IN HOLDING NAVIGABILITY PURELY A QUESTION OF FACT AND IN NOT HOLDING NAVIGABILITY TO BE MIXED QUESTION OF LAW AND FACT TO BE DETERMINED BY THE LOCAL LAW OF THE STATE OF OKLAHOMA AS PRONOUNCED BY THE SUPREME COURT OF THE STATE.

Benner v. *Porter*, 9 How. 236, 13 L. ed. 119..... 67
Cherokee Nation v. *Hicthcock*, 187 U. S. 294, 47 L. ed. 163. 65
Coyle v. *Smith*, 113 Pac. 957 30
Coyle v. *Smith*, 221 U. S. 559, 55 L. ed. 853 ---- 72
Dana v. *Hurst*, 86 Kan. 947, 122 Pac. 1041. 37
Decisions of Judge Pollock, Judge United States district Court, Eastern District of Kansas, in case of *Jackson Walker Coal & Material Co.* v. *Hodges*, not yet officially reported. -------- 41
Donnelly v. *U. S.* 228 U. S. 243, L. ed. 820..... 59
Illinois Cen. Ry. Co. v. *State of Ill.* 146 U. S. 387, 36 L. ed. 1018. 32
Lone Wolff v. *Hitchcock*, 188 U. S. 553, 47 L. ed. 291. 65
Martin v. *Waddell*, 16 Peters 266, 10 L. ed. 997. 26
Munford v. *Wardwell*, 73 U. S. 423, 18 L. ed. 756. 28
Permoli v. *Municipality No. I of City of New Orleans*, 3 How. 589, 11 L. ed. 739..... 66
Pollard v. *Hagan*, 8 How. 201, 11 L. ed. 565 69
Scott v. *Lattig*, 227 U. S. 229, 57 L. ed. 33 31
Shively v. *Bolby*, 150 U. S. 1, 38 L. ed. 531..... 29
State v. *Akers*, 92 Kan. 169, 140 Pac. 637 37

State v. *Nolegs*, 40 Okla. 479, 137 Pac. 943 24
U. S. v. *Chandler-Dunbar Water Power Co.* 229 U. S. 53, 57 L. ed. 1063 36
U. S. v. *Mackey*, 214 Fed. 137 53
Ward v. *Race Horse*, 163 U. S. 505, 41 L. ed. 245..... 68
Wear v. *State of Kansas*, 245 U. S. 145, 62 L. ed. 214 57
Weber v. *State Harbor Commissioners*, 85 U. S. 57, 31 L. ed. 798. ..... 29- 63

PROPOSITION II.

ERROR OF TRIAL COURT AND CIRCUIT COURT OF APPEALS IN NOT HOLDING THE ARKANSAS RIVER NAVIGABLE UNDER THE LAWS OF THE UNITED STATE WITHIN THE RULE ANNOUNCED BY DECISIONS OF THIS COURT.

Archer v. *Greenville Sand & Gravel Co.*, 233 U. S. 60, 58 L. ed. 850. 81
Donnelly v. *United States*, 228 U. S. 243, 47 L. ed. 820 81
Economy Light & Power Co. v. *U. S.*, decided April 11, 1921. 77
People v. *Economy Light & Power Co.*, 240 Ill. 290, 89 N. E. 760 81
The Montello, 20 Wall. 430, 22 L. ed. 391..... 77
Wear v. *State of Kansas*, 245 U. S. 145 81

PROPOSITION III.

ERROR OF THF TRIAL COURT AND CIRCUIT COURT OF APPEALS IN NOT HOLDING ARKANSAS RIVER A NAVIGABLE WATER OF THE UNITED STATES AND THAT IT IS NAVIGABLE AS A MATTER OF LAW.

Act of Congress granting Cleveland Bridge Co. right to construct bridge across Arkansas River, Between Pawnee and Osage Counties, Oklahoma, Approved February 17, 1897, 29 Stat. at Large 530. 83
Dana v. *Hurst*, 86 Kan. 947, 122 Pac. 1041. 84
Letter from Secretary of War to Attorney General, Aug. 12, 1915. 101

Letter from Hon. Lindley M. Garrison, Secretary of War, dated March 23, 1915, to Attorney General 89- 90
Letter of Secretary of War Lindley M. Garrison, dated August 26, 1915 to the President, on the question of navigability of the Arkansas River 103-106
Letter from Secretary of War to the President dated Sept. 30, 1915, on subject of navigability of the Arkansas River 106-107
Memoranda for Department of Justice, In Re: Arkansas River, prepared under direction of Honorable Lindley M. Garrison, Secretary of War, Sept. 16, 1914. 86
Memoranda prepared for Secretary of War by General Dan C. Kingman, Chief of Engineers in War Department, on navigability of the upper Arkansas River 90- 93
Memoranda prepared for Secretary of War by General E. H. Crowder, Judge Advocate General of the War Department on the position of the War Department on the question of the navigability of the Arkansas River above Grand River. 93-101
Report of Chief of Engineers of War Department, 1897. 84
State v. *Akers*, 140 Pac. 637, 92 Kan. 169 84
Two little letters from Secretary of War, Newton D. Baker to Attorney General on subject of Navigability of Arkansas River 108

THREE TESTS OF NAVIGABILITY.

(1). Actual navigability in fact.
(2). Tidal test, that stream or other water is navigable because within ebb and flow of tide
(3). Legal test, including streams possessing potential navigability. 110
Board of Park Commissioners v. *Kimball*, 100 N. W. 927 126
Cardwell v. *Sacramento County*, 79 Calif. 347, 21 Pac. 763 125

Carr v. *Moore*, 119 Iowa 148, 83 N. W. 52.....
Donnelly v. *U. S.*, 220 U. S. 243, 57 L. ed. 820 .....
Lux v. *Higgin*, 69 Cal. 255, 10 Pac. 674 .....
Martin v. *Waddell*, 16 Peters 367, 10 L. ed. 997 ....
Pollard v. *Hagan* 3 How. 212, 11 L. ed. 665.....
Re; Horicon Drainage District, 136 Wis. 227, 116 N. W. 12 .....
State v. *Dibble*, 49 N. C. 107 .....
State v. *Wabash Paper Co.*, 22 Ind. App. Ct. Rep. 167, 51 N. E. 949 .....
Vol. 14 Enc. of Evidence, ...
Wood v. *Hustis*, 21 Wis. 429 .....

.... 128
.... 121
.... 123
.... 110
.... 111
27,
.... 114
.... 118
ep.
.... 120
.... 119
.... 116

In the Supreme Court of the United States

No. 270.

BREWER-ELLIOTT OIL & GAS COMPANY, a Corporation, et al., *Appellants*,

vs.

UNITED STATES OF AMERICA, et al., *Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS

Nature and Result of Case.

This suit was filed on April 9, 1914, in the District Court of the United States for the Western District of Oklahoma, by the United States as Trustee for the Osage Tribe of Indians and for itself against the Brewer-Elliott Oil and Gas Company, and certain other oil companies and operators holding oil and gas leases executed by the Commissioners of the Land Office of the State of Oklahoma on portions of the bed of the Arkansas River in Sections 1, 12 and 13, Range 7 East, Sections 6, 7, 24 and 25, Range 8 East, and Section 30, Range 9 East, all in Township 21 North, between Osage and Pawnee Counties, in the State of Oklahoma, and a decree was sought cancelling the leases and en-

joining operations thereunder and quieting title to the premises in the Osage Tribe of Indians.

The bill of complaint alleged that pursuant to certain Treaties between the United States and the Cherokee Tribe of Indians and the Osage Tribe of Indians and pursuant to certain laws of the United States and a deed executed by the Cherokee Tribe of Indians on June 14, 1883, to the United States in trust for the use and benefit of the Osage Tribe of Indians, that Tribe of Indians was the owner of all that part of the bed of the Arkansas River described in the leases executed by the Commissioners of the Land Office which lies East and North of the main channel of the River; and it was alleged that pursuant to the Acts of Congress, Treaties and deed referred to the Osage Tribe of Indians entered into possession of the land in controversy, and was at the time the suit was filed in possession of the same, and that under the Act of Congress providing for the allotment of Osage lands the oil, gas and other mineral rights were reserved in the tribe. It was further alleged "that the said Arkansas River, as the plaintiff is informed and verily believes and so alleges the fact to be, is not and never has been navigable in fact, and is not now and never has been what is known as a navigable stream within the purview of the laws of the United States where the same runs through and by the Osage Indian Reservation;" that under and by virtue of the leases and assignments the defendants claim certain right, title and interest in and to the oil and gas in and under the bed of the Arkansas River and in said bed north and east of the main channel of said river and within the boundaries of the Osage Reservation as defined by the Act of Congress of June 5, 1872, and that the defendants were prospecting for and drilling for oil and gas within the boundaries of said Indian Reservation as estab-

lished by said Act of Congress, and are threatening to continue to do so; that the prospecting and drilling for oil on the premises is without authority of the plaintiff or the Osage Tribe of Indians or the Secretary of the Interior, and that some of the defendants were erecting structures and oil derricks in the bed of the river within the limits of the Osage Indian Reservation, which constitutes an obstruction to navigation, if said stream be navigable, which obstructions were erected without submission of the plans therefor by the Chief Engineers of the War Department and without being authorized by the Secretary of War and without being affirmatively authorized by Congress. It was also alleged that the title to the bed of the Arkansas River North and East of the main channel thereof at the place in controversy was in the Osage Tribe of Indians, whether the Arkansas River be navigable or not; and an injunction was sought to prevent the maintenance of the obstructions in the bed of the river and to prevent the drilling and operation of oil and gas wells therein (Transcript 5 to 45).

On June 11, 1914, by permission of the court, the State of Oklahoma, on the relation of Lee Cruce, Governor, and the Commissioners of the Land Office of the State of Oklahoma, intervened in the action, and after admitting certain formal parts of the bill of complaint, denied that the drilling of oil wells and the erection of oil derricks on the premises in controversy constituted an obstruction to navigation such as would amount to a violation of the laws of the United States, and denied that the land described in the bill of complaint which lies below the high water mark along the left bank of the Arkansas River is the property of and belongs to the Osage Tribe of Indians, but alleged that the same is the property of and belongs to the State

of Oklahoma, and that the beneficial interest therein belongs to the lessees of the State of Oklahoma, and their assigns. They alleged that the several leases executed by the Commissioners of the Land Office of the State of Oklahoma were in all respects valid, legal and binding and conveyed to the lessees and their assigns all the rights, interests and privileges set forth in the several leases, conferring upon the lessees and their assigns the right to operate oil and gas wells on the premises described in the leases; and in the ninth paragraph of the plea of intervention the State of Oklahoma and the Commissioners of the Land Office alleged that the Arkansas River is a meandered, fresh water, non-tidal stream, and that on the dates and times mentioned in the bill of complaint said stream was and is now a navigable stream under the laws of the United States, and since the admission of the State of Oklahoma into the Union on the 16th day of November, 1907, the said Arkansas River at the places mentioned in the bill of complaint was and is under the laws of the State of Oklahoma a navigable stream and that both the United States of America and the State of Oklahoma have at all times treated and dealt with said stream as a navigable stream. That in making the survey of the lands adjacent to the banks of said Arkansas River throughout its course in the State of Oklahoma, United States public surveyors, in pursuance of law, rules, regulations and requirements of the Commissioners of the Land Office of the United States meandered said Arkansas River and did not extend the lines of said survey across the same, but excluded the bed of said river lying below the high water mark along the bank on either side thereof from said survey and from the patents and any and all other conveyances of said land, thereby withholding the bed of said river below the high water mark on either side from disposition under

the patents or other conveyances thereafter to be issued, and that at the time of the admission of the State of Oklahoma into the Union said several tracts of land described in the bill of complaint which lies below the high water marks in the bed of said river were reserved and held in trust by the United States for the State of Oklahoma; that on the admission of the State into the Union it became by virtue of its inherent sovereignty the owner of the bed of said river below high water mark along the banks thereof, together with the oil and gas and other minerals situated therein; and that the State of Oklahoma is now the owner of the bed of said river. It is further alleged that under and by virtue of said ownership and in accordance with the laws of the State of Oklahoma and the rules, regulations and requirements of the Commissioners of the Land Office, said several leases were duly and legally executed and authorized the lessees and their assigns to operate oil and gas wells on the several tracts of land described in the leases (Transcript 50 to 55).

The oil companies and operators filed answers adopting and re-affirming all the allegations contained in the plea of intervention of the State of Oklahoma, and the Commissioners of the Land Office and asserting the validity of the oil and gas leases and the right of the lessees and their assigns to operate oil and gas wells on the premises in controversy (Transcript 55 to 59).

A number of separate controversies arose between the State lessees and certain lessees of the Osage Tribe of Indians, but for the purpose of this appeal we do not regard it as necessary to discuss the issues arising therefrom (Transcript 74-75).

The complainant filed a reply to the plea of intervention and the answers of the several defendants, which consisted in substance of a denial of ownership on the part of the State of the bed of the Arkansas River below the high water mark and all the other contentions made by the intervenors and the defendants, but admitted that it was a meandered stream.

On the 11th day of June, 1914, the complainant and the State of Oklahoma and the Commissioners of the Land Office filed in the court below a stipulation that pending the final determination of the suit the production of oil and gas from the land in controversy should be proceeded with under the leases executed by the Commissioners of the Land Office and that a receiver should be appointed to hold subject to the final determination of the suit the royalties provided for in the leases, and providing in great detail regulations governing the operation of oil and gas wells on the premises. Pursuant to the stipulation F. H. McGuire was appointed receiver to hold the royalties and his duties defined in detail (Transcript 60-67).

The trial was begun in the court below before the Honorable John H. Cotteral on the 6th day of December, 1915. At the beginning of the trial the parties filed a written stipulation to the effect that any part of the testimony contained in the record on appeal to the Supreme Court of the State of Oklahoma in the case of the *State of Oklahoma* v. *Nolegs*, decision reported in 40 Okla. 479, 139 Pac. 943, and in the record of the Supreme Court of the United States in the case of *Kansas* v. *Colorado*, decision reported in 206 U. S. 46, so far as the same may be material or relevant to the issue of navigability of the Arkansas River in this case, may be read in evidence on the final trial hereof by any

party hereto, and admitted by the court to the same extent and with the same effect as if the witnesses who testified in those cases were present and testifying in this case. And it was further stipulated that all the evidence concerning the issue of navigability of the Arkansas River received on the final hearing of certain other cases now pending in the United States District Court for the Eastern District of Oklahoma, and the United States District Court for the Western District of Oklahoma, in which that issue is involved, may be considered on the final hearing of this cause to the extent and with the same effect as if the same had been received in this cause (Transcript 137-138).

The case was finally argued and submitted to the court January 1st, 1916 (Transcript 145), and on the 21st day of February, 1918, Judge Cotteral handed down a decision (Transcript 769-797), and caused to be entered the final decree holding that the Osage Tribe of Indians in Oklahoma acquired as a part of its reservation the title to the bed of the Arkansas River lying adjacent to the lands of said Reservation in the State of Oklahoma as far as and extending to the middle of the main channel of said river, together with the underlying oil and gas and other minerals, by virtue of the Act of Congress approved June 5, 1872, and as confirmed by the deed of the Cherokee Nation of Indians dated June 14, 1883; that the title to said portion of said river bed and said minerals are subject to lease only for the benefit of said Tribe as provided by the laws of the United States and as may be hereafter provided by law, and that said title of said Tribe and the United States as its Trustee should be and the same is hereby quieted; that the defendant lessees and their sub-lessees, assigns and successors in interest and the intervenors and each of them, have no right, title or interest in and to said portion

of said river bed or minerals, and that the leases therefor of the defendant companies and their said sub-lessees, assigns and successors, from the State of Oklahoma and its officers and agents, involved in this cause, be, and the same are hereby cancelled and held for naught. It was further ordered and decreed that the net proceeds which have been or may hereafter be realized by the receiver from the oil and gas in the premises, belong to and be paid by him to the United States in trust for said Tribe, and that the lessees, their sub-lessees, assigns and successors, and said intervenors, be denied any part thereof, and that they be enjoined from prospecting for or taking oil, gas or other minerals from said portion of the river, except in accordance with the orders of the court for operation and payment under and in connection with the receivership in this cause for the preservation of the funds. It was further ordered that the cause be retained for the purpose of settling and paying the costs and charges of the receivership, of the apportioning to the plaintiff for the Tribe its interest in the funds, and for making all proper future orders, and that in the meantime during the pendency of any and all appeals in the case the receiver be continued in his duties as heretofore directed subject to the future orders of the Court (Transcript 795-797).

Proper exceptions were taken and an appeal was prosecuted to the United States Circuit Court of Appeals for the Eighth Circuit, which court, in an opinion filed December 14, 1920, affirmed the judgment of the court below. (Transcript 827-836). An appeal was then prosecuted to this Court.

Judge Cotteral, who presided in the trial court, in his opinion, made extensive findings of fact, holding that the

Arkansas River at the *locus in quo*, as well as all that portion of the river lying north of the mouth of the Grand River, was not a navigable stream in fact, and made an order "that the findings as contained in the written opinion filed on the rendition of the final decree in the above entitled cause be, and the same are hereby adopted as the findings of fact by the court herein" (Transcript 795).

Findings of Fact By Trial Judge and Other Evidence Offered in the Trial Court on the Question of Navigability of the River.

While the court made an order adopting the recital of the evidence contained in the written opinion as the findings of fact by the court, the facts on which the court based its opinion are not very clearly set forth, because the facts so found are inseparably interwoven with the statement of legal conclusions and for that reason we felt that it was necessary to incorporate the evidence in condensed form in the record in order that this Court might be fully informed as to the issues involved.

The first fact which the court seemed to have found from the evidence is, that the Osage Reservation was purchased from the Cherokee Nation and was a part of the land of the Cherokee Nation acquired out of the domain of the Louisiana Purchase, and that as the lands described in the Cherokee patent of December 31, 1838, lie on both sides of the Arkansas River the first inquiry is naturally whether they had title to the bed of the river, *if navigable*, and that conceding full force to the laws and treaties applicable, it is clear that the Cherokees had no title to any *navigable stream* in their territory, and as a result they

could convey none in any event to the bed of the Arkansas River at the Osage boundary *if the river was there navigable*. That by the deed from the Cherokee Nation certain whole and fractional townships were conveyed, the latter being on the left bank of the Arkansas River and that by the deed and the plat thereto attached, which the court held to be a part of the deed, it was not intended to convey the bed of the river to the middle of the main channel thereof, although a resultant title would attach to the bed of the river as far as the middle of the main channel thereof *if the river was not navigable*. That no purpose was declared in the transaction relative to the Osage lands to invest them with such an extraordinary right as *title to a navigable stream*, and that the conclusion best sustained is that there was not any grant or conveyance to the Osage Tribe of title to the bed of the Arkansas River *if in fact navigable* at the boundary of the Osage Reservation (Transcript 771-3).

The court next found that if the river *is not navigable* at the location in controversy, then the Tribe as riparian proprietor owns the bed to the middle of the main channel, and by the terms of the Osage Allotment Act of June 28, 1906, the minerals therein belong solely to the Tribe and are subject to lease for its benefit. But *if the river is there navigable*, then by the general rule invoked by the intervenors and defendants, as broadened in this country, and in force in Oklahoma, the title to the bed was held in trust for the State and inured to the State when admitted into the Union on an equal footing with the other States, subject to the paramount power of Congress in the control of navigation to the end of regulating interstate and foreign commerce, and in that event the power of the State would

arise to appropriate and dispose of the oil and gas found in the bed of the river.

The court then found that the *issue of navigability is one of fact;* that the purely legal test of navigability could not be accepted, and that a river is not navigable unless so in fact; that it will be deemed navigable when used or susceptible of use in its ordinary condition as a highway of trade and travel in the customary modes on water; that the exceptional use of a stream for purposes of transportation in times of temporary high water, or the mere fact that logs, poles and rafts are floated down the stream occasionally in high water, does not make it a navigable river. That to meet the test, a water course should be susceptible of use for purposes of commerce in the transportation to market of the products of the country through which it runs. The stream should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability or one that is temporary or precarious is not sufficient.

The court then found that in the present case giving to all matters within general knowledge full weight, no sufficient reason is found to sustain the holding that the Arkansas River above the mouth of the Grande River in Oklahoma is or ever has been navigable as a matter of judicial notice, and the soundness of that view has been demonstrated by proof, and that the court was therefore bound to hold that the issue as to the navigability of the Arkansas River is dependent upon proof in fact by evidence and other sources of information (Transcript 777).

The court found that the effect of meandering the Arkansas River cited as supporting the navigability was over-

estimated, and that the fact that the river was meandered should be taken merely as some evidence of navigability, and that while Acts of Congress making appropriations for the improvement of the Arkansas River and grants by Congress to construct railroad bridges over the Arkansas River are proper to be considered, they are inconclusive and leave the fact of actual navigability quite open to proof.

After reviewing at length the testimony introduced on the question as to whether or not the Arkansas River was navigable as a matter of fact, the Court concludes:

> "By the test given in controlling authorities but one finding is justified in this case, and that is, that it is clearly established that such portion of the Arkansas River is not and has not been navigable, and hence, that it is not and has not been navigable along the south boundary of the Osage Reservation and at the particular location here in controversy. Such findings will be made."

That it follows as a matter of law that the Osage Tribe acquired the title to the river bed to the middle of the main channel along the south boundary of its Reservation, now Osage County, and at the locations in controversy, and thereby became and is the sole owner of the underlying oil, gas and other minerals, and that the United States holds title to such portion of the river and the minerals in trust for the Tribe (Transcript 769 to 795).

The court further found that the Arkansas River has been the subject of decision in several cases, citing *Hurst* v. *Dana*, 86 Kans. 947, 122 Pac. 1041; *United States* v. *Mackey*, 214 Fed. 126; *State* v. *Nolegs*, 40 Okla. 479, 139 Pac. 943.

Referring to the decision of the Supreme Court of Oklahoma in the Nolegs case, the court in substance held that the evidence before the Oklahoma Supreme Court in that case was not sufficient to justify the holding that the Arkansas River was a navigable stream at the locations involved in this case, and stated that the main question in that case was whether the court should take judicial notice of the navigability of the river in the sense of vesting title to the bed in the State. Reference is made to the kind of evidence considered by the Supreme Court including a letter from the Commissioner of Indian Affairs approved by the head of the Interior Department dated in March, 1908, holding the river to be navigable through the Cherokee Nation, and certain Acts of Congress specifically referred to in the decision of the Oklahoma Supreme Court. In refusing to be bound by the decision of the Supreme Court in holding the Arkansas River navigable at the locations involved in this case the court below said:

> "Harmony in judicial decisions is recognized to be important, especially in the same state, but upon a question of general law this court will exercise an independent judgment, although leaning to an agreement with the state court if the question presented is balanced in doubt, and that giving to all matters within general knowledge full weight no sufficient reason is found to sustain the holding that the Arkansas River above the mouth of the Grande River is or ever has been navigable."

The record shows that both blaintiff and defendant on the trial of this case introduced by agreement part of the evidence which was before the Supreme Court of Oklahoma in the Nolegs case, consisting of the testimony of witnesses familiar with the Arkansas River along the south and west boundary of the Osage Nation (Transcript

185 to 188). The State of Oklahoma and the other defendants introduced the testimony given in the Nolegs case by Thomas Beard, C. M. Swartz, John W. Ortner, Austin Randel, E. C. Carter, J. W. Jordan, E. C. Gray and Hugh Pitzler.

At page 617 of the Transcript it appears that Thomas Beard testified in the Nolegs case as follows: That he had lived in Arkansas City, Kansas, for forty years; that he was acquainted with the circumstances of the boat, Aunt Sallie, being at Arkansas City about thirty or forty years ago; that that boat laid around the city about a month and made excursions up and down the river; that the boat came up the river from the State of Arkansas, but he does not recollect whether from Fort Smith or Little Rock. He was on the boat and celebrated the Fourth of July, 1878, on the boat, riding up and down the river. After that there were several boats built at that point in the river, but he does not recollect their names. Witness states that he used the Arkansas River to bring lumber down from Wichita, fifty miles above Arkansas City; that he rafted the steel for a bridge on walnut.

It also appears at page 621 that C. W. Swartz testified in the Nolegs case that he had lived in Arkansas City and nearby for forty years; that he was acquainted with the Arkansas River and is acquainted with the circumstances connected with the visit to Arkansas City of the boat named Aunt Sallie. He states that other boats that he remembers being at Arkansas City are the Kansas Miller, the Cherokee, and several others, the names of which he does not recall; that the Aunt Sallie was around Arkansas City for several weeks and that he would say the size was 20x100 feet; that at that time there was no

railroad to Arkansas City and these boats were used to convey merchandise to market.

It also appears at page 623 of the Transcript that John W. Ortner testified on the trial of the Nolegs case that he has lived in Cleveland, Oklahoma, ever since the opening of the strip in 1893; that he has been in the mill business and also in the stock business at Cleveland, marketing his products mostly at Tulsa; that he built a boat and hauled some of his products by boat, the boat being 9x42 feet, and would carry about 60 or 70 hogs weighing 200 pounds each. He also shipped walnut gun stocks, but no products from the mill. When the river was high he has made the trip from Cleveland to Tulsa in half a day, but other times he has had a lot of bad luck and taken a day or a day and a half. The distance between the two places is from fifty to sixty miles, and he operated his boat from about May until the latter part of July; that he used this boat for about two years on the river, making from three to six trips a season. On the return trip from Tulsa witness stated he would bring merchandise to the merchants at Cleveland. The engine on his boat was six-horse power.

It appears at page 629 of the Transcript that Austin Randel testified in the Nolegs case that he had lived at Cleveland since 1893; that he was acquainted with the condition of the Arkansas River around Cleveland, and that his experience with the river consists in seining, fishing, rafting logs, running a ferry boat, and other boats; that he rafted logs in the river about seven years ago on a two-foot rise in the river to a point to where he wanted to cut them into shingles.

It also appears at page 632 of the Transcript that E. C. Carter testified in the Nolegs case that he had been at

Cleveland, Oklahoma, since 1903; that in 1908 he made a trip on the Arkansas River from Cleveland to the mouth of the river in a gasoline boat 26 feet long and 6 feet beam with 18 inches draught, and a six-horse power engine. On this trip witness was accompanied by his cousin as far as the mouth of the river. He did not stop at the mouth of the Arkansas River, but went on to Vicksburg, Mississippi, in the boat. He left Cleveland about the month of May at a low stage of water.

It also appears at page 647 of the Transcript that Isaac D. Taylor testified in the Nolegs case that he was at that time Assistant United States Attorney for the Western District of Oklahoma, and was then representing the Indian Nolegs in the litigation involving the island in controversy; that this representation is by virtue of his office, the law directing the United States Attorney to appear for the Indians that were still incompetent; that there was a request made by his office to the War Department in reference to the navigability of the Arkansas River. In reply to this request witness stated he received a letter dated October 8, 1911, signed "For the Attorney General Earnest Knabel, Assistant Attorney General," together with an enclosure dated September 25, 1911, signed "For the Attorney General, Earnest Knabel, Assistant Attorney General," and another enclosure dated October 11, 1911, signed by someone as acting Secretary of War. The letters referred to are marked Exhibits "KK" and "JJ," and are as follows:

"War Department, Washington,
"October 11, 1911.

"Sir:

"Referring to your letter of 25th ult. requesting the War Department view as to navigability of Arkansas River

in Osage County, Oklahoma, I beg to inform you that it appears from the records of the Engineer authorities that said river at the location mentioned is a navigable waterway within the purview of laws enacted by Congress for the preservation and protection of such waters and of decisions by the Supreme Court of the United States on the subject, and the Department has uniformly so held.

"Respectfully,

"Robert Shaw Oliver,

"Acting Secretary of War."

(Transcript 596).

"Department of Justice, Washington,

"October 18, 1911.

"John Embry, Esq.,
"United States Attorney,
"Guthrie, Okla.
"Sir:—

"Referring to your letter of October 18, requesting certain information from the War Department relative to navigability of the Arkansas River in the vicinity of Nolegs Island, Oklahoma, there is enclosed herewith a letter dated October 11, 1911, from the Acting Secretary of War in which he states that the War Department has uniformly held that the river is navigable in the location mentioned. A copy of the departmental letter of the 26th ult. requesting information from the War Department is also enclosed.

"Respectfully,

"For the Attorney General,

"Earnest Knabel, Assistant

"Attorney General."

(See Transcript, page 597).

The evidence referred to which was before the Supreme Court of Oklahoma in the Nolegs case is here called to the attention of the court to show that the Oklahoma

Supreme Court in holding the Arkansas River to be a navigable stream, did not rely solely on judicial notice.

But on the contrary the evidence before the trial court and the Supreme Court in that case justified the holding that the Arkansas River was a navigable stream independent of judicial notice. We invite the court to carefully read the testimony of the witnesses introduced on behalf of the state as set forth at pages 617, 621, 623, 629, 632 and 647 of the Transcript.

The trial court based its decision solely on the question as to whether or not the evidence showed that the river was navigable in fact; stating the rule to be that the issue of the navigability of a stream is one of fact, and, when used or susceptible of use in its ordinary condition as a highway of trade and travel in the customary modes on water, a stream will be deemed "navigable." It held that under the treaties, statutes and deed to the United States in trust for the Osages, the Osage Indians did not acquire title to the bed of the Arkansas River if it was navigable.

The decision in favor of the Osage Tribe was based on the fact that in the treaties between the United States and that Tribe of Indians, the oil and gas rights were reserved to the Tribe and that since the Tribe was the riparian owner along the left bank of the Arkansas River, the Tribe as such riparian proprietor, owns the oil and gas rights to the adjacent river bed.

The trial judge distinctly held that if the river was navigable, the title to its bed would be in the State under

and by virtue of its inherent sovereignty, but the Circuit Court of Appeals flatly dissented from this view and held that whether the river was navigable or not, the treaties between the United States and the Cherokee Nation, vested the title to the bed of the stream in that Nation, and that under the Acts of Congress, treaties and deeds in favor of the Osage Tribe, that Tribe acquired title to that part of the river bed lying to the North and East of the center of the channel and that the rights of the Cherokees and Osages having been acquired before the creation of the State of Oklahoma, the United States had no right in the bed of this part of the stream which could pass to the State on its admission.

Under the view of the law taken by the Circuit Court of Appeals, the navigability of the stream immaterial because long before the admission of the State, all rights in the river bed had been disposed of by the United States to the Indians. We think this view of the law is wholly untenable, and we believe, in view of prior decisions of this court, it will not be sustained.

The Transcript contains a large amount of documentary evidence introduced by both parties on the question of the navigability of the Arkansas River to which the attention of the cause will be called later.

We here respectfully present for the consideration of the court, the following assignments of errors:

Assignment of Errors.

I.

The Honorable Circuit Court of Appeals erred in holding that the trial court did not make a mistake of fact in its finding that the Arkansas River was not navigable at the place of the premises in controversy.

II.

The Honorable Circuit Court of Appeals erred in holding that the trial court did not fall into an error of law in holding that the Arkansas River at the place in controversy, was not navigable as a matter of law, and that the title to the bed of the Arkansas River below highwater mark, and the oil and gas therein were not in the state of Oklahoma.

III.

The Honorable Circuit Court of Appeals erred in not holding that the question of navigability of the Arkansas River at the place of the premises in controversy is to be decided by the local law of the State of Oklahoma.

IV.

The Honorable Circuit Court of Appeals erred in not following and being bound by the decision of the Supreme Court of Oklahoma rendered on March 10, 1914, in case of State v. Nolegs, reported in 40 Okla. 479, 139 Pac. 943.

V.

The Honorable Circuit Court of Appeals erred in not sustaining the fourth assignment of error of these defendants and appellants and interveners and appellants in said Circuit Court of Appeals, said fourth assignment reading:

"The Court erred in finding and holding that the issue of navigability is one of fact only and that a river is not navigable unless so in fact."

VI.

The Honorable Circuit Court of Appeals erred in not sustaining the eleventh assignment of error of these defendants and appellants and interveners and appellants in said Circuit Court of Appeals, said eleventh assignment of error reading:

"The Court erred in not holding that the title to the bed of the Arkansas River throughout the State of Oklahoma and particularly at the location of the leases in controversy herein below the high water mark on either side of said river was in the State of Oklahoma."

VII.

The Honorable Circuit Court of Appeals erred in not sustaining the twelfth assignment of error of these defendants and appellants, in said Circuit Court of Appeals, said twelfth assignment of error reading:

"The Court erred in refusing to follow and be bound by the decision of the Supreme Court of the State of Oklahoma in the case of State v. Nolegs, 40 Okla. 479, 139 Pac. 943, wherein the Supreme Court of the State of Oklahoma held and adjudged that the Arkansas River throughout the State of Oklahoma is a navigable stream and that the title to the bed of said River is in the State of Oklahoma."

VIII.

The Honorable Circuit of Appeals erred in holding that the Osage Tribe of Indians were vested with the title to a tract of land including the banks on both sides of the Arkansas River at place of leased property in controversy in this cause and to the bed of said Arkansas River between the said banks prior to the time in 1907 when the State of Oklahoma came into the Union.

IX.

The Honorable Circuit Court of Appeals erred in holding that when the State of Oklahoma in 1907 came into the Union, the United States had no beneficial right, title or interest in that portion of the leased premises in controversy in this cause and the State of Oklahoma never received or had any such right or interest in said leased premises.

X.

The Honorable Circuit Court of Appeals erred in not holding that the Arkansas River at the place of the premises in controversy in this cause was navigable in law and that the title to the bed of the Arkansas River throughout the State of Oklahoma and particularly at the location of the leases in controversy herein below the high water mark on either side of said River was in the State of Oklahoma.

XI.

The Honorable Circuit Court of Appeals erred in holding that the title to the bed of the Arkansas River below the high water mark and the title and ownership of the oil and gas rights, at the location of the leases in controversy herein was and is in the Osage Tribe of Indians.

Argument and Citation of Authorities.

For convenient discussion of the questions involved, we have reduced the assignment of errors to certain definite proportions of law.

I.

The Trial Court and the Circuit Court of Appeals erred in holding that the navigability of the Arkansas River as involved in this case, is purely a question of fact, and in not holding the navigability of the river to be a mixed question of law and fact, to be determined by the local law and the Supreme Court of the State of Oklahoma in the case of State v. Nolegs, reported in 40 Okla. 479, 139 Pac. 943, having established the local law on the subject and declared that the Arkansas river is a navigable stream at the locus in quo and throughout the State of Oklahoma, the trial court, the Circuit Court of Appeals and this Court are bound by that rule of the local law; and should adopt the same and determine the rights of the parties to this suit in accordance therewith.

In order to present this question we invite the attention of the court to the history of the ownership of the beds of navigable streams and their waters in this country and to the early decisions defining the nature of the rights and titles held by the states therein. And in this connection we submit that such rights and titles are inseparably connected with the sovereignty of the state; that the beds of navigable waters are held by the states not merely in a proprietory character, but that they are held for the benefit of the public and are not subject to perpetual disposition by the states to private owners, as the states may dispose of other property or the public domain; but that the states

hold the beds of navigable waters as an incident to their sovereignty for the benefit of the public, to the same extent and for the same purposes, that they possess the police power, to be perpetually exercised in the administration of State government; that the rights, duties and obligations of the states which arise from their ownership of the beds of navigable streams pertain to the states in their local governmental capacity; and that all questions touching their ownership, or disposition are local questions to be determined by the laws and decisions of the states, and that no question of federal law or of general law, is involved in the determination of the title of the states to the beds of navigable streams.

In the case of *United States* v. *Chandler-Dunbar Water Power Company*, 229 U. S. 53, 57 Law Ed. 1063, the Supreme Court said:

> "The technical title to the beds of the navigable rivers of the United States is either in the states in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law. *Shively* v. *Bowlby*, 152 U. S. 1, 31, 38 L. Ed. 331, 343, 14 Sup. Ct. Rep. 548; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 624, 632, 56 L. Ed. 570, 578, 581, 32 Sup. Ct. Rep. 340; *Scott* v. *Lattig*, 227 U. S. 229, 44 L. R. A. (N. S.) 107 *ante* 490, 33 Sup. Ct. Rep. 242."

It is important to note that the United States never owned the original or primary title to the bed of navigable waters; that the original thirteen states acquired title to the beds of navigable waters as incident to their sovereignty upon the establishment of their independence from Great Britain, and that the new states, as they have been admitted into the Union from time to time on an equal foot-

ing with the original states, as a matter of constitutional necessity, became the owner of the beds of navigable waters; that during the territorial condition the federal government held the beds of navigable waters only in trust for the future states, and that Oklahoma, and the other new states immediately on their admission to the Union, became possessed of all of the rights, duties and obligations possessed by the old states in the beds of navigable waters. That, therefore, all questions pertaining to the title to the beds of navigable streams in Oklahoma, and the other new states, are local questions to the same extent that they would be local questions in the original states; that all questions affecting the title or disposition of the beds of navigable streams in the states, are as separate and distinct from federal questions, or what the trial judge calls the general law, as any question could be which arises in the exercise of the police powers of the states, and which affect purely domestic affairs of the states, such as the descent and distribution of property, or the power and jurisdiction of local courts of the State.

Since the Federal Government never held the title to the beds of navigable streams in the original states, except by cession from the states, and held the title to the beds of navigable streams in the territories only in trust for the future states—the states' title in navigable streams being primary and original, and that of the United States being derivative or as trustee—it is not difficult to distinguish the local questions which arise in determining the navigability of streams, as affecting the title of the state to bed of the stream, from any question which arises under the Constitution and laws of the United States relating to the use of navigable streams. Hence we assert the law to be that when the Supreme Court of the State, after full hear-

ing, has decided that one of the principal streams of the state is navigable and that the title to the bed of the stream is in the state, the decision is binding on all other courts; that the question of the navigability of a stream is so much a mixed question of law and fact, and so inseparably connected with the sovereignty of the state in the exercise of its police power and the duty to protect the rights of its citizens in the navigable stream, within the state, that the decision of the question of navigability cannot be reduced to a mere issue of fact in the determination of which the parties would have a right to a trial by jury; that the question is rather one of local state law, and so far as a question of fact may enter into the decision, it is of a kind which should be established once for all time and not be perpetually retried.

No discussion or consideration of this question would be complete without a thorough understanding of the case of *Martin* v. *Waddell*, 16 *Peters*, 367, 10 Law Ed. 997, where in the United States Supreme Court held that upon establishment of the independence of the American Colonies the "people of each State became themselves sovereign; and in that character held the absolute right to all navigable waters and the soils under them for their own common use subject only to the rights since surrendered by the Constitution to the general government." The court in that case also held that New Jersey by virtue of her succession to all rights of sovereignty theretofore held by the British Crown and English Government in navigable waters and the soils under them, became the sole proprietor of the soil and had the power and authority to grant at least for a limited time rights in the soil for private use subject only to the inalienable rights of the public and the powers conferred on Congress.

A companion case to *Martin* v. *Waddell, supra,* in determining the underlying propositions in the case, is *Pollard* v. *Hagan,* 8 How. 201, 11 L. Ed. 565, where the Supreme Court held for the first time that *"the new States have the same rights, sovereignty and jurisdiction"* in navigable waters and the soils under them as the old States.

The court in that case said:

> "Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. *To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the Constitution, laws and compact to the contrary notwithstanding.* But her rights of sovereignty and jurisdiction are not governed by the common law of England as it prevailed in the Colonies before the Revolution, but as modified by our own institutions. In the case of *Martin et al.* v. *Waddel,* (16 Peters 410), the present Chief Justice, in delivering the opinion of the court, said: '*When the Revolution took place, the people of each State became themselves sovereign; and in that character held the absolute right to all their navigable waters and the soils under them for their common use, subject only to the rights since surrendered by the Constitution.*' Then to Alabama belong the navigable waters and the soils under them in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the States could diminish or enlarge these rights. * * *
>
> "*This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and*

they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any National right of eminent domain or jurisdiction with which the United States have been vested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, and the laws which shall be made in pursuance thereof."

In the case of *Munford* v. *Wardwell*, 73 U. S. 423, 18 L. Ed. 756, which involved the title to a lot of land subject to the ebb and flow of the tide in San Francisco Bay, the Supreme Court said:

"California was admitted into the Union September 9, 1850, and the Act of Congress admitting her declares that she is so admitted on equal footing, in all respects, with the original States (9 Stat. at L. 452). Settled rule of law in this court is that the shores of navigable waters and the soils under the same in the original States were not granted, by the Constitution to the United States, but were reserved to the several States; *and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders.* *Pollard* v. *Hagen*, 3 How. 212.

"When the Revolution took place, the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable

waters and the soils under them, subject only to the rights since surrendered by the Constitution. *Martin* v. *Waddell*, 16 Pet. 410.

> *"Necessary conclusion is that the ownership of the lot in question, when the State was admitted into the Union, became vested in the State as the absolute owner subject only to the paramount right of navigation."*

In the case of *Webb* v. *State Harbor Commissioners*, 85 U. S. 57, 21 L. Ed. 798, the Supreme Court said:

> "Although the title to the soil under the tide-waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they *held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in and dominion and sovereignty over all soils under the tide waters within her limits passed to the State, with the consequent right to dispose of the title in any part of said soils in such manner as she might deem proper*, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General Government. *Pollard* v. *Hagen*, 3 How. 212; *Mumford* v. *Wardwell*, 6 Wall. 436, 18 L. Ed. 761."

In *Shively* v. *Bowlby*, 152 U. S. 1, 38 L. Ed. 531, the Supreme Court said:

> "In the recent case of *Hardin* v. *Jordan* (1891), 140 U. S. 371 (35, 428), in which there was a difference of opinion upon the question whether a survey and patent of the United States, bounded by a lake which is not navigable, in the State of Illinois, was limited by the margin or extended to the center of the lake, all the justices agreed that the question must be de-

termined by the law of Illinois. Mr. Justice Bradley, speaking for the majority of the court, and referring to many cases already cited above, said: 'With regard to grants of the Government for lands bordering on tide-water, it has been distinctly settled that they only extend to high water mark, and that the title to the shore and lands under water in front of lands so granted inures to the State within which they are situated, if a State has been organized as established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery—*and cannot be retained or granted out to individuals by the United States.* Such title being in the State, the lands are subject to State regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands as is frequently done by leasing oyster beds in them and granting fisheries in particular localities; also by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce."

In *Coyle v. Smith*, 113 Pac. 957, the Supreme Court of Oklahoma, speaking through Mr. Justice Williams, said:

"In *Hinman* v. *Warren et al.*, 6 Or. 409, it is said: 'But it is contended that this sovereignty did not attach until the State was admitted into the Union. This is true, but *it is also equally true that the United States Government has no constitutional or statutory authority to so act towards a territory or so dispose of the lands within a territory, as to make it impossible to admit such territory upon an equal footing with the other States of the Union.* In all matters which touch the sovereignty, the General Government is, in the very nature of our system, simply a protector thereof

until the territory assumes the ample powers of a State, and becomes thereby enabled to assert and protect its own sovereignty. *Pollard's Lessees* v. *Hagan, supra.*'

"In *Case* v. *Toftus* (C. C.), 39 Fed. 730, 5 L. R. A. 684, Judge Deady said: 'In *Hinman* v. *Warren*, 6 Or. 408, the court went further and held that the United States cannot dispose of the tide lands, even in territory. This decision is also based on a dogma of State sovereignty; that is, the sovereignty of a State in futuro, which is yet, so to speak, in utero, or the womb of time, and may never be born. The proposition is supported by the assertion 'that the United States Government has no constitution or statutory authority to so act towards a territory, or so dispense of the lands within a territory, as to make it impossible to admit such territory upon an equal footing with the other States of the Union.' In Gould on Waters, Section 40, it is said that this is the only adjudication upon the subject of the power of the National Government 'while holding the title to the soil of the tide-waters,' to make a valid conveyance of the same. The author adds: 'The decisions of the Supreme Court of the United States have been thought to lead to the conclusion reached in *Hinman* v. *Warren*, but it would seem that there is no very direct expression of such a view in the opinions of that court'."

A decade after *Hinman* v. *Warren* (*supra*) was decided by the Supreme Court of Oregon, the United States Supreme Court decided the case of *Hardin* v. *Jordan* (*supra*), wherein it was definitely declared that the title to the shore and lands under navigable water is regarded as incidental to the sovereignty of the State, and "cannot be retained or granted out to individuals by the United States."

In the case of *Scott* v. *Lattig*, 227 U. S. 229, 57 Law Ed. 33, in discussing the effect of the admission of the

state into the Union on title to the bed of a stream or islands in a stream, this court said:

> "Besides, it was settled long ago by this court, upon a consideration of the relative rights and powers of the Federal and state governments under the Constitution, that lands underlying navigable waters within the several states belonging to the respective states in virtue of their sovereignty, and may be used and disposed of as they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations, and that each new state, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones. *St. Clair County* v. *Lovingston*, 23 Wall. 46, 68, 23 L. ed. 59, 63; *Barney* v. *Keokuk*, 94 U. S. 324, 338, 24 L. ed. 224, 228; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 434-437, 36 L. ed. 1018, 1035-1037, 13 Sup. Ct. Rep. 110; *Shively* v. *Bowlby*, 152 U. S. 1, 48-50, 58, 38 L. ed. 331, 349, 14 Sup. Ct. Rep. 548; *McGilvra* v. *Ross*, 215 U. S. 70, 54 L. ed. 95, 30 Sup. Ct. Rep. 27."

The case of *Illinois Central Railway Co.* v. *State of Illinois*, 146 U. S. 387, 36 L. Ed. 1018, holds that the State possesses the ownership, dominion and sovereignty over lands under navigable waters in trust for the public, and that that trust can only be discharged by the management and control of the property in the interests of the public, and that the ownership and dominion of the State cannot be relinquished by a transfer of the property to corporations or individuals.

In that case the court said:

> "The question, therefore, to be considered is whether the legislature was competent to thus deprive

the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State.

"That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide-water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. *But it is a title different in character from that which the State holds in the lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale.* It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein free from obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purposes, no valid objections can be made to the grant. It is grants of parcels of land under piers, docks and other structures in aid of commerce, and navigable waters, that may afford foundation for whatever grants of parcels which, being occupied, do not substantially impair the public interests in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases, as a valid exercise of legislative power consistently with the trust to the public, upon which such lands are held by the State. *But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the naviga-*

ble waters of an entire harbor or bay, or of a sea or lake. Such abdication, is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purpose of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interests in the land and water remaining. It is only by observing the distinction between a grant of such parcels, for the improvement of the public interests, or which when occupied do not substantially impair the public interests in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in the opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the land under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. *The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interests in what remains, than it can abdi-*

cate its police powers in the administration of government and the preservation of the peace."

The public rights and duties inseparably connected with the ownership of the bed of a navigable stream being of a local nature and being a part of the municipal sovereignty of the State, it is entirely appropriate that the decisions of the State courts with reference thereto, should be binding upon the federal courts.

If, as stated by the Supreme Court of the United States in *Illinois Central Railway Company* v. *State of Illinois, supra,* the title to the beds of navigable waters is held by the State for the public purposes of the State and can be no more abdicated or surrendered than the State can abdicate or surrender its police power in the administration of State government and the preservation of the public peace within the State, then clearly the question of navigability as it arose in this case, is a local one to be determined by the decision of the Supreme Court of the State of Oklahoma.

In the case of *State* v. *Akers,* 92 Kans. 169, 140 Pac. 637, the Supreme Court of Kansas had under consideration the question as to whether or not the Arkansas River in Kansas and the Kansas River at Topeka were navigable streams.

In discussing the question as to under what law the navigability of streams should be determined; that is, whether by the law of the State, or under the general law or some other law, the Kansas Supreme Court said:

> "If there being any one proposition upon which the courts have agreed 'with no variableness, neither shadow of turning,' it is that the extent of the title of

the owner of lands bordering upon navigable waters depends upon the local law. Whether under a patent from the United States the title extends to the center of the stream or lake or is limited to the margin thereof is everywhere held to be dependent on the law of the State. *Martin* v. *Waddell*, 16 Pet. 367, 10 U. S. (L. Ed.) 997; *Pollard* v. *Hagan*, 3 How. 212, 11 U. S. (L. Ed.) 565; *Weber* v. *Harbor Com'rs.*, 18 Wall. 57, 21 U. S. (L. Ed.) 798; *Barney* v. *Keokuk*, 94 U. S. 324, 24 U. S. (L. Ed.) 224; *Packer* v. *Bird*, 137 U. S. 661, 11 S. Ct. 210, 34 U. S. (L. Ed.) 819; *Hardin* v. *Jordan*, 140 U. S. 371, 11 S. Ct. 808, 838, 35 U. S. (L. Ed.) 428; *Shively* v. *Bowlby*, 152 U. S. 1, 14 S. Ct. 548, 38 U. S. (L. Ed.) 331; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 U. S. (L. Ed.) 570; *Scott* v. *Lattig*, 227 U. S. 229, 35 S. Ct. 242, 57 U. S. (L. Ed.) 490, 44 L. R. A. (N. S.) 107.

"In *Barney* v. *Keokuk*, *supra*, it was said:

"'If they (the states) choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections' (p. 338).

"In *U. S.* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 33 S. Ct. 667, 57 U. S. (L. Ed.) 1063, it is said in the opinion:

"'The technical title to the beds of the navigable rivers of the United States is either in the states in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law' (cases cited, p. 60).

"In the recent case of *Kansas* v. *Colorado*, 206 U. S. 46, 27 S. Ct. 655, 51 U. S. (L. Ed.) 956, the United States itself was a party and resisted a claim asserted by Kansas to the ownership on the bed of the Arkansis River. In the opinion Mr. Justice Brewer said:

"'But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this

case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters' (p. 93). A multitude of cases to the same effect might be cited from the courts of the various states. In fact, whether a patent of upland from the United States conveyed the title to the bed of navigable streams is not a federal question within the removal acts. (Gould on Waters, 3d Ed., Sec. 40; *Kenyon* v. *Knipe*, 46 Fed. 309.) Although in a former edition the exact contrary was said to be the law. (Gould on Waters, 2d Ed., Sec. 40.)

"Our first inquiry, therefore, must be, what is the law of Kansas? In his dissenting opinion in *Hardin* v. *Jordan, supra*, Mr. Justice Brewer, after stating that 'beyond all dispute the settled law of this court, established by repeated decisions, is that the question, how far the title of a riparian owner extends, is one of local law' (p. 402), used this language:

" 'For a determination of that question the statutes of the state and the decisions of its highest court furnished the best and the final authority' (p. 402).

"We have no hesitation in declaring that the law of Kansas upon this question has been settled not only by statutory authority, but by previous decisions of this court, notably: *Wood* v. *Fowler*, 26 Kans. 682, 40 Am. Rep. 330, and *Dana* v. *Hurst*, 86 Kans. 947, 122 Pac. 1041. In *Wood* v. *Fowler, supra*, the action was to restrain defendants from cutting and removing ice forced on the surface of the Kansas River within certain described boundaries. It involved the title of the riparian owner, who claimed to own to the center of the stream. It was decided in that case that a riparian owner owns only to the bank and not to the center of the navigable stream. In the opinion Mr. Justice Brewer, after reciting historical facts showing that the Kansas River is a navigable stream, used this language:

" 'The stream having been meandered, the lines of the surveys are bounded by the bank; the patents from the United States title only to the bank. Splitlog, as riparian owner, owned only to the bank. The title to the bed of the stream is in the state' (p. 688).

"We shall have occasion to refer again to this decision upon another branch of the present case.

"In *Kregar* v. *Fogarty*, 78 Kans. 541, 96 Pac. 845, it was said:

" 'In disposng of public lands bordering upon rivers it is not the policy of the government to reverse title to the lands under water, whether the stream be navigable or not. The government parts with its whole title, leaving the question of boundary, whether the shoreline or the thread of the stream, to be determined by the local law. In case of navigable waters in this state the boundary is at the bank, and the title to the bed of the stream is in the state,' citing *Wood* v. *Fowler, supra,* and *Hardin* v. *Jordan,* 140 U. S. 371, 11 S. Ct. 808."

The case of *State* v. *Akers* was taken to the Supreme Court of the United States by writ of error, and is reported at pages 145-149 of 245 U. S. under style of *Norman Wear* v. *State of Kansas, ex rel. S. M. Brewster, Attorney General,* 62 L. Ed., page 214.

In the Supreme Court, the Attorney General of Kansas made the contention that so far as navigability relates to title it is a State and not a Federal question, and cited many of the authorities referred to in the case of *State* v. *Akers* (*supra*) in support of this proposition.

In affirming the decision of the Supreme Court of Kansas and reiterating the doctrine that so far as navigability relates to title, the State law governs, this Court said (245 U. S. 218, 62 L. Ed. 158):

"Then it was said, if navigability in fact is the test, the plaintiffs in error were entitled to go to a jury on that fact as it was in 1860, the date of the original grant, and the Supreme Court of the State was not entitled to take judicial notice that the river was navigable at Topeka.

"*But there is no constitutional right to trial by jury in such a case, and if a state court takes upon itself to know without evidence whether the principal river of the state is navigable at the capital of the state, we certainly cannot pronounce it error. In this aspect it is a question of state law.*

"*Donnelly* v. *United States*, 228 U. S. 243, 262, 57 L. Ed. 820, 828, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913 E. 710. See *Archer* v. *Greenville Sand & Gravel Co.*, 233 U. S. 60, 68, 69, 58 L. Ed. 850, 853, 854, 34 Sup. Ct. Rep. 567.

"*The fact is of a kind that should be established once for all, not perpetually retried.*

"The court had, too, in favor of its decision, the circumstance that the stream was meandered in the original surveys; the decisions of its predecessors. (*Wood* v. *Fowler*, 26 Kans. 682, 40 Am. Rep. 330; *Topeka Water Supply Co.* v. *Potwin*, 43 Kans. 404, 413, 23 Pac. 578; *Johnston* v. *Bowersock*, 62 Kan. 148, 61 Pac. 740; *Kaw Valley Drainage Dist.* v. *Missouri, P. R. Co.*, 99 Kans. 188, 202 L. R. A. —, 161 Pac. 937; *Kaw Valley Drain. Dist.* v. *Kansas City Southern R. Co.*, 87 Kans. 272, 275, 123 Pac. 991, S. C. 233 U. S. 75, 58 L. Ed. 857, 54 Sup. Ct. Rep. 564); legislation of the state (Private laws of 1858, Chap. 30, Sec. 3, Chap. 31, Sec. 4, Chap. 34, 1860, Chap. 20, Sec. 3, etc.), and of the United States (Act of May 17, 1886, Chap. 348, 24 Stat. at L. 57, Act of January 22, 1894, Chap. 15, 28 Stat. at L. 27; Act of July 1, 1898; Chap. 546, 30 Stat. at L. 597, 633, etc.); and the assent, so far as it does, of this court (*Kansas City So. R. Co.* v. *Kaw Valley*

Drainage Dist., 233 U. S. 75, 77, 58 L. Ed. 857, 858, 34 Sup. Ct. Rep. 564) ; not to speak of the allegations in the answers of the Wear Sand Company, adopted, notwithstanding his denial of navigability, by Fowler, the other plaintiff in error before this court."

We invite special attention in this connection to the decision of the Supreme Court of the United States in *Donnelly* v. *U. S.*, 228 U. S. 243, 57 L. Ed. 820, where, according to the third paragraph of the syllabus, it is said:

> "*What shall be deemed a navigable water within the meaning of the local rules of property in the bed of a stream is for the determination of the several states.*"

In the body of the opinion, speaking on this point, the Supreme Court of the United States said:

> "The question of the navigability in fact of non-tidal streams is sometimes a doubtful one. *It has been held that what are navigable waters of the United States, within the meaning of the act of Congress, in contradiction to the navigable waters of the states, depends upon whether the stream in its ordinary condition affords a channel for useful commerce.*"

After citing a number of cases in support of that view, that is, as to what are navigable waters of the United States within the meaning of Acts of Congress, the Supreme Court said:

> "*But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several states.*
>
> "Thus, the State of California, if she sees fit, may confer upon the riparian owners of the title to the bed of any navigable stream within her borders."

The most recent decision on the subject here discussed as to whether navigability so far as concerns the question of title should be determined by the laws and decisions of the State in which the question arises, or by the general law, is that of Judge Pollock in the case of Jackson Coal & Material Co. against George Hodges and others in the District Court of the United States for the District of Kansas, not officially reported, but decided by him in May, 1918, in which Judge Pollock reviews all the questions involved, and held that the decision of the Supreme Court of Kansas in holding the Arkansas River navigable was binding. Owing to the fact that this opinion has not been officially reported we have furnished opposing counsel copies of it. It appears in that case that the plaintiff, Jackson Walker Coal & Material Co. brought an action against certain officials of the State to restrain them from enforcing or attempting to enforce against the plaintiff the provisions of an act of the Kansas Legislature relating to the sale and taking of the sand, oil, gas, gravel, mineral and other natural products whatsoever from the bed of any river in Kansas which is the property of the State. The Act of the Legislature in question made it unlawful for any person, partnership or corporation to take from within or beneath the bed of any navigable river or any other river which is the property of the State of Kansas, any sand, oil, gas, gravel, mineral or any natural product, and provided that when any person should desire to take from any such river, any sand, gravel, oil, gas or mineral, he should first obtain the consent of the executive council of the State of Kansas, and upon the payment of such sums of money as the executive council may deem just, consent for the taking of the same may be granted.

In discussing the question, Judge Pollock said:

"The ground upon which the plaintiff proceeds is that the attempted and threatened acts of the defendants to enforce the provisions of said law against it will deprive it of its property without due process of law, and for the reason, as contended by plaintiff, the bed of the Arkansas River at or near the city of Wichita, Sedgwick County, this state, is the property, and belongs in fee to the plaintiff, and does not belong to the state. That the state has neither title nor right in it and no power to exact a revenue from it. This claim of title in plaintiff is based on the fact that it is the owner in fee of a tract of land described in the petition, as follows:

"'A certain tract of land situated in the County of Sedgwick, in the State of Kansas, and lying within the boundaries of the City of Wichita; the said tract being bounded on the south by Orme Street in said city, and extending thence north to Kellogg Street in said city, and thence north to Dewey Street in said city, and bounded on the north by a line running east and west 125 feet north of said Dewey Street; and on the west by the middle line of a certain stream of water course commonly known as the Arkansas River; and on the east by a line running north and south at an average distance of three hundred feet east from the east bank of said stream.'

"That the land borders on the river, and that the Arkansas River at this place is not in fact a navigable stream, but is non-navigable, hence plaintiff's title to the tract extends to and covers the bed of the river to the thread of the stream, and extends over and includes within it the place from which the sand is taken.

"Other parties engaged in the business of taking and marketing sand from the bed of the Arkansas River at other points have asked and obtained leave to intervene in this suit, to-wit, The Arkansas City Sand

Company, the Arkansas River Sand Company and The Schwarts Lumber & Coal Company.

"On issues joined and on full proofs taken, and briefs and arguments of solicitors for the respective parties, the case stands submitted for final decree.

"The sole question presented in the case for determination is this: Is the Arkansas River in the county of Sedgwick near the city of Wichita, at the point where plaintiff engages in the business of taking sand from the bed of the river, a navigable stream? If not, confessedly the plaintiff's ownership of the tract of land in question extends to the middle of the stream and covers the sand heretofore and now being removed by it therefrom and defendants have no claim thereon as representatives of the state under the act quoted. However, if the stream at this point is navigable, the bed of the stream confessedly belongs to the state and the act above quoted is applicable and the complaint must be dismissed for want of equity.

"In determining the question of the navigability of the Arkansas River at the point in question the first and controlling problem is this: What is meant by the term 'navigable' as applied to the subject-matter of this case? On this the parties differ. The plaintiff contends in argument the sole question is, Is Arkansas River at this point or has it been within the history of the state, navigable in fact? While the defendant contends the navigability of the river at this place is a question governed and controlled by local law of the State. In other words, the defense contends the term 'navigable' as employed in litigation of this character denotes a fixed and established status or condition under the local law of the state binding on all parties in all matters in litigation of this character, as contradistinguished from the ever changing rule of navigability in fact, which must be determined as a fact in each recurring case and only for the purpose of decision in that case.

"It is readily apparent these conflicting views must be considered and the true rule of decision in cases of this character ascertained to avoid most incongruous results. For, if the term be defined as contended by plaintiff, and the question in each individual case as it arises must be investigated and determined solely as one of fact, it may then well happen the Arkansas River will be declared to be non-navigable at Wichita and navigable up the river from that point at Hutchinson, or below at Arkansas City; and applying the rule of property confessed by both parties in this suit to exist and be inforce in this state, the adjoining riparian proprietors of land at Arkansas City, below Wichita, on the river, and at Hutchinson, above, would take and hold his land only to the bank of the stream, because the river would there be declared to be navigable, while the adjoining proprietor at Wichita would by his conveyance take, hold and own to the center of the river as it would have been there determined as a matter of fact to be non-navigable. For, the common law having been expressly adopted in this state in aid of its statutes, and it being the doctrine of the common law, the proprietor of lands adjoining upon non-navigable streams takes and owns to the middle or thread of the stream, but takes only to the bank of navigable streams, it is clear the question of the navigability or non-navigability of the stream thus becomes a rule of property in the state, and being such rule of property must be invariable.

"This case involves, as has been seen, solely a question of property rights in a portion of the bed of the Arkansas River. It becomes a question of the utmost and controlling importance to first determine whether the question of the navigability of the Arkansas River at the *locus in quo* shall be determined as the question of fact, as contended by plaintiff, or a question of local law of the state, as contended by defendants.

"There can be no question but that under the act of admission into the Union in the year 1861 the State of Kansas was granted the same rights of sovereignty and jurisdiction over the beds of navigable streams as was granted to the original states. This state, as was said by Mr. Justice McKinley of the State of Alabama, in *Pollard's Lessee* v. *Hagan et al.*, 3 How. 212:

" 'Was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of agreement, but the public lands.'

"Hence, it would seem to be well settled that as this state was by the Federal act of admission granted plenary jurisdiction and power over the beds of navigable streams within its borders it could establish such rules as it deemed proper for the government of riparian rights along such streams. As was said by Mr. Justice Bradley in *Barney* v. *Keokuk*, 94 U. S. 324: 'It is for the States to establish for themselves such rules of property as they may deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent thereto.'

"The apparent confusion found in the adjudicated cases involving questions arising over the navigability of waters in our country, in some of which the test applies is navigability in fact, and other navigability in law, on a mere careful study and analysis of the subject-matter of the litigation in dispute in such case will be seen to be merely apparent and not real, and to spring from our dual form of government.

When the question is one arising out of the navigation of the stream, such as an obstruction to navigation, which, by reason of the Federal Constitution, falls under the authority of the Congress, there the test applied is, Is the water navigable in fact; but, when the subject-matter of the litigation involved is a property right, as the right of a riparian owner, such as in this case, the test applied is this: Is the stream a navigable one under the local law of the state established for the purpose of settling property disputes? In other words, what has the law making power of the state declared the rule of property in such state to be as defined by express legislative enactments or by the highest judicial tribunal of the state? That this is the true rule of decision is nowhere more clearly stated than by Mr. Justice Pitney, delivering the opinion for the court in *Donnelly* v. *United States*, 228 U. S. 243, where it is said:

"'*It properly belongs to the States by their inherent sovereignty*, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated.

"'The doctrine thus enunciated has since been adhered to, *Packer* v. *Bird*, 137 U. S. 661, 669; *Hardin* v. *Jordan*, 140 U. S. 371, 382; *Shively* v. *Bowlby*, 152 U. S. 1, 40, 58, *St. Anthony Falls Water Power Co.* v. *Water Commissioners*, 168 U. S. 349, 358; *Scott* v. *Lattig*, 227 U. S. 229, 243.

"'The question of the navigability in fact of nontidal streams is sometimes a doubtful one. It has been held in effect that what are navigable waters of the United States, within the meaning of the act of Congress, in contradiction to the navigable waters of the

States, depends upon whether the stream in its ordinary condition affords a channel for useful commerce. *The Montelle*, 20 Wall. 430; *Leovy* v. *United States*, 177 U. S. 621, 632; *United States* v. *Rio Grande*, 174 U. S. 690, 698; *South Carolina* v. *Georgia*, 93 U. S. 4, 10; *The Parsons*, 191 U. S. 17, 28.

" 'But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several states. Thus the State of California, if she sees fit, may confer upon the riparian owners the title to the bed of any navigable stream within her borders.'

"In *Kansas* v. *Colorado*, 206 U. S. 46, Mr. Justice Brewer, speaking for the court, said:

" 'But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each State has full jurisdiction over the lands within its border, including the beds of streams and other waters.'

"In *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, Mr. Justice Lurton, delivering the opinion for the court, said:

" 'The technical title to the beds of the navigable rivers of the United States is either in the States in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law. *Shively* v. *Bowlby*, 152 U. S. 1, 31; *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 624, 632; *Scott* v. *Lattig*, 227 U. S. 229. Upon the admission of the State of Michigan into the Union the bed of the St. Marys River passed to the State, and under the law of that State the conveyance of a tract of land upon a navigable river carries the title to the middle thread. *Webber* v. *The Pere Marquette &c.*, 62 Mich. 626; *Scranton* v. *Wheeler*,

179 U. S. 141, 163; *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S. 447.'

"From the foregoing and many other cases that might be cited controlling here, it is made plain the question here presented being one controlled by the property rule of the state, when we ascertain what the established rule of the state is, that rule is controlling. This question has many times received consideration by the Supreme Court of the State: In the case of *Dana* v. *Hurst*, 86 Kans. 947, it was held:

" 'The title to the bed of the Arkansas River within the boundaries of Kansas is in the state.'

"In delivering the opinion in that case, Mr. Justice West said:

" 'The one clear question on which a decision is sought is, Who owns the bed of the river? It is argued that from public records, declarations and enactments we should judicially regard the river as set apart for public highway for interstate commerce, its bed thereby vesting in the state. It is not pretended that the river is now navigated or navigable in fact in Kansas, and the court, as well as everybody else, know that it is not. But does this conclude the matter? * * *'

"After reference to the public acts of the Congress, the territory and the state, and the many adjudicated cases, the Justice delivering the opinion for the court concludes:

" 'In answer to all this it may be said that the only sensible and practical basis of determination is the familiar one of present navigability in fact, and that to hold this stream is navigable is equivalent to ruling that sand may be navigated. But let it be said once more that present navigability is not and cannot be determinative. If we are forced to hold that the river was navigable in fact when set apart as a

public highway, then we are compelled to hold that it is still thus set apart, or else that in some way this setting apart has been abrogated, the power of the government lost, and the title to the bed of the stream diverted. We have been pointed to no reason or authority for holding the latter and can find none. There is no indication in any public act or declaration that the intention was to set apart for a public highway only so much of a stream as might from time to time, without improvement, remain navigable in fact.

" 'We must meet conditions as we find them. As already suggested this stream is now navigable for more than six hundred miles above its mouth, and the testimony showed that within the present generation actual navigation was to a slight extent carried on as far up as Wichita. It seems anomalous and absurd that it must be left for a jury to say that the same stream, of the same general width, volume and character, may, during its hundreds of miles flow through this state, be at one point navigable in fact now and at another not; and then that it must be held that at one of such places it is also navigable in law and at the other unnavigable in law, it being within the possibilities that still another jury might find that the same stream still higher up is navigable. Thus the title to the bed would be left shifting and uncertain, according to the way different juries might determine the question as a matter of fact. The question as to when a stream once navigable ceases to be so by non-use or by the accumulation of sand or soil is one on which we have been afforded no light. But considering the character, width and length of the river, the various acts and declarations by Congress in reference thereto, and the policy shown thereby with reference to waters which more than one hundred years ago were navigable according to the needs and uses of that time, and which led into Mississippi, we deem it justifiable to hold, and do hold, that while

the stream is not now navigated in fact anywhere in Kansas, it has, nevertheless, not ceased to be a highway set apart by national act and declaration for public use in the manner and at the time to be determined upon by the federal government. This being true, the title to the bed is in the state, and islands therein not surveyed or claimed by the government belong also to the state, and under the act of 1907 may be sold as school land. (Laws 1907, Chapt. 378, Gen. Stat. 1909, Sec. 8202).

"'It is not the ordinary question of navigability in law, depending upon present navigability in fact. It is one rather of governmental intention, declaration, acts and power considered in connection with the character and history of the stream.'

"See, also, *Wood* v. *Fowler*, 26 Kans. 682; *Kregar* v. *Fogarty*, 78 Kans. 541; *Norman S. Wear et al* v. *State of Knasas, ex rel. S. M. Brewster, Attorney General*, — Kans. —, recently affirmed by the Supreme Court of the United States, to which Mr. Justice Holmes, delivering the opinion for the court, says:

"'Then it was said, if navigability in fact is the test, the plaintiffs in error were entitled to go to a jury on that fact, as it was in 1860, the date of the original grant, and the Supreme Court of the State was not entitled to take judicial notice that the river was navigable at Topeka. But there is no constitutional right to trial by jury in such a case, and if a State court takes upon itself to know without evidence whether the principal river of the State is navigable at the capital of the State, we certainly cannot pronounce it error. In this aspect it is a question of State law. *Donnelly* v. *United States*, 228 U. S. 243, 262; see *Archer* v. *Greenville Sand & Gravel Co.* 233 U. S. 60, 68-69. The fact is of a kind that should be established once for all, not perpetually retried. The court had, too, in favor of its decision, the circumstances

that the stream was meandered in the original surveys; the decisions of its predecessors; *Wood* v. *Fowler*, 26 Kans. 682; *Topeka Water Supply Co.* v. *Porwin*, 43 Kans. 404, 413; *Johnston* v. *Bowerstock*, 62 Kans. 148; *Kaw Valley Drainage District* v. *Missouri Pacific Railway Co.*, 99 Kans. 188, 202; *Kaw Valley Drainage District* v. *Kansas City Southern Ry. Co.*, 87 Kans. 272, 275, S. C. 233 U. S. 75; Legislation of the State; Private Laws of 1858, C. 30, 4 c. 31, 4 c. 34, 1860, c. 20, No. 3, &c.; and of the United States; Act of May 17, 1886, c. 348, 24 St. 57; Act of January 22, 1894, c. 15, 28 St. 27; Act of July 1, 1898, c. 546, 30 Stat. 597, 633, &c.; and the assent, so far as it goes, of this Court; *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75, 77, not to speak of the allegations in the answers of the Wear Sand Company, adopted, notwithstanding his denial of navigability, by Fowler, the other plaintiff in error before this court.'

"While from a consideration of the proofs taken and submitted in this case, and from the general knowledge common to all men, there can be no possible doubt whatever the Arkansas River at the point in controversy in this case is not now, and has not, since its known history, been navigable in point of fact; that is to say, the stream in its ordinary condition does not afford a channel for useful commerce, hence is not navigable within the meaning of acts of Congress on that subject as defined in *The Montelle*, 20 Wall. 430; *Loevy* v. *United States*, 177 U. S. 621; *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690; *South Carolina* v. *Georgia*, 93 U. S. 4; *The Robert W. Parsons*, 191 U. S. 17, and many other cases. However, from what has gone before, it must, I think, be held, in this case, the navigability of the stream in point of fact is not the true test. On the contrary, the true test is, whether the Arkansas River at the *locus in quo* must be regarded as navigable under the

local law of the State of Kansas, as ordained and established for the purpose of the unvarying determination of the property rights of riparian owners along its course throughout the state. That by the local property rule established in this state, once for all, the title to the bed of the Arkansas River within the state, is vested in the state and not in the adjoining riparian owner.

"It follows, the petition of plaintiff, being without equity, must be dismissed.

"It is so ordered."

The reference to the transcript above set forth shows that in the decision of the case of the *State* v. *Nolegs*, 40 Okla. 479, 139 Pac. 943, the Supreme Court had before it not only many acts of Congress recognizing the navigability of the Arkansas River at the exact point in controversy in this case, and the fact that the Interior Department recognized the river as navigable, but it had before it the testimony of numerous witnesses, some offered in support of the navigability of the stream, and some in opposition to that contention. The decision of the court is clear and unmistakable, and under the authorities cited above is binding and conclusive of this controversy here.

The Supreme Court in that case said:

"Numerous errors are assigned by those aggrieved by the judgment below, and one of the principal questions is whether or not this court will take judicial notice that the Arkansas River is a navigable stream in such sense that the title of the bed thereof is vested in the state. This identical question was before the Supreme Court of Kansas in *Dana* v. *Hurst et al., State Intervenor*, 86 Kan. 947, 122 Pac. 1041, in November, 1911, and again on rehearing in April, 1912. There the title to an island in the Arkansas

River in Reno County, near Hutchinson, was involved. The court held that the Arkansas River is a navigable stream at that point *in such sense as that the title to the bed of the river and the islands therein not claimed by the federal government passed to the state.*

"In the Federal Court for the Eastern District of Oklahoma, in the case of *United States* v. *Mackey et al.*, opinion by Judge Campbell, rendered in June, 1913, reported in 214 Fed. 137, wherein the question of the title to the bed of the Arkansas River at a point near Tulsa, was involved, it is held that the Arkansas River is a navigable stream so far as concerned the question of title to the bed thereof, and that the State of Oklahoma owns the bed of the Arkansas River below high-water mark; and the case of *Dana* v. *Hurst, supra,* was expressly approved.

"In addition to the numerous acts of Congress, public records and documents of the several departments at Washington, cited in the Kansas case, wherein the navigability of the Arkansas River is recognized, we find in the Eleventh Census Report of the United States, 1890, in Statistics of Transportation by Water, the following statement: 'Commencing at the head of navigation, on the Arkansas, and then following down through the fertile valley contributary to it, the cities of Wichita, Arkansas City, Fort Smith, Dardanelle, Little Rock and Pine Bluff, six of the largest cities in the valley, which, together with their surrounding counties, have a population of 400,000 inhabitants, depend very largely for their commercial growth and prosperity on the outlet furnished by this river, which in the census year carried 1,663,817 tons of freight.'

"Also see letter dated March 26, 1908, from the Acting Commissioner of Indian Affairs, Hon. C. F. Larrabee, to the Secretary of the Interior, from which it appears that Lowerree Rucker Company had applied to the United States Indian Agency, Union

Agency, for permission to enter into a contract for taking sand and gravel from the Arkansas River within the limits of the Cherokee Nation; at which time it also appears there were other contracts for the taking of sand and gravel from the Arkansas river, which the War Department had held to be a navigable stream, and that all the parties to such contract were contending that from and after November 16, 1907, when the Indian Territory became a part of the State of Oklahoma, neither the Cherokee Nation nor the Department of the Interior had further jurisdiction with the matter; that they should no longer be required to pay royalty for sand and gravel taken from the bed of a navigable stream. J. G. Wright, Commissioner to the Five Civilized Tribes; asked for instructions, which letter concluded as follows:

"'The Arkansas river throughout its length in the Cherokee Nation is a navigable stream under the laws of the United States. Under the above-quoted holding of the court, it must be conceded that when the State of Oklahoma was created, its jurisdiction and ownership of the lands below high-water mark of all navigable streams within its boundaries became absolute. In other words, when the United States conveyed by warranty deed the lands occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles, it did not convey the ownership of the beds of navigable streams, but reserved them for the benefit of the future state, within whose boundaries they would fall. Thus the State of Oklahoma, on its creation, became absolute owner of the bed of the Arkansas River, and the Cherokee Nation is not entitled to royalty for any sand or gravel taken from the bed of that river since November 16, 1907. Very respectfully, (signed) C. F. Larrabee, Acting Commissioner.

"'March 27, 1908.

"'Approved: (Signed) Jesse E. Wilson, Secretary.'

"Also, see Act Feb. 17, 1897, c. 238, 29 Stat. at Lar. 531, which is an act authorizing the Cleveland Bridge Company to construct a bridge across the Arkansas River between Pawnee County, Oklahoma, and the Osage Indian Reservation, on Section 9, Township 21, Range 8 E., the same being three or four miles above the island in controversy in this case, which was approved February 17, 1897. The second section thereof is as follows: 'That the bridge constructed under this act shall be a lawful structure, and shall be recognized as a post route, upon which no charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States, and equal privileges in the use of said bridge shall be granted to all telegraph companies, and the United States shall have the right of way across said bridge and approaches for postal purposes: Provided, that before the construction of any bridge herein authorized is commenced the said company shall submit to the Secretary of War for his examination and approval, a design and drawing for such bridge and a map of the location, giving sufficient information to enable the Secretary of War to fully and satisfactorily understand the subject; and unless the plan and location of such bridge are approved by the Secretary of War the structure shall not be built. Provided, further, that any bridge constructed under authority of this act shall at all times be so kept and enlarged as to offer reasonable and proper means for the passage of vessels and other water craft through or under said structure, and for the safety of vessels passing at night there shall be displayed on said bridge, from sunset to sunrise, such lights or other signals as may be prescribed by the Light-House Board.'

"Also see Act, Jan. 29, 1897, Stat. at Lar. 505, c. 108, an act to authorize the Muskogee, Oklahoma & Western Railroad Company to construct and operate a line of railway through Oklahoma and the Indian

> Territory, * * * And said railroad company is also hereby authorized, in case it so elects, for the greater accommodation of the public, to so construct its bridge across the Arkansas river as to make it a suitable and safe structure for the crossing of vehicles of all kinds, animals and foot travelers, as well as railroad trains: Provided, 'that the plans of structure of all bridges across navigable streams, along and upon the right of way herein provided for, shall be subject to the approval of the Secretary of War.'
>
> "See also first section of an act of Congress to authorize the construction of a bridge across the Arkansas River at Fort Gibson, Ind. T., approved February 24, 1902, c. 28, 32 Stat. 37, which is in terms practically the same as the second section of the act authorizing the Cleveland Bridge Company to bridge the Arkansas River, above quoted.
>
> "The above cases of *Dana* v. *Hurst, supra,* and *United States* v. *Mackey, supra,* both being exhaustive and well considered opinions, the same are approved by this court, and we hold that the Arkansas River is a navigable stream in its entire course through the State of Oklahoma, and that the title of the bed thereof, to the high-water mark, is in the state."

The court also had before it a knowledge of the general characteristics of the Arkansas River; that it is the largest tributary of the Missouri-Mississippi River drainage system of the Western Hemisphere; that it is fully 2000 miles in length and drains an area of possibly 200,000 miles of territory.

The trial judge, in discussing the decision of the Supreme Court in the Nolegs case, gives as his reason for refusing to follow it that a main question was whether the court would take judicial notice of the navigability of the

river in the sense of vesting title to the bed in the state. He then states that harmony in judicial decisions is recognized to be important, but says that upon a question of general law his court will exercise an independent judgment. The authorities cited by us show that the question of navigability, so far as concerns the question of title, is not a question of general law but one of local law of the state in which the question arises.

In the Nolegs case and in this case the identical fragment of the river is involved. The Supreme Court of Oklahoma held the river to be navigable. The trial judge held under his conception of the general law that it was not navigable. This situation presents a striking illustration of the necessity of the rule announced by the Supreme Court of the United States in the case of *Wear* v. *State of Kansas*, 245 U. S. 145, 62 L. Ed. 214, where in speaking of the navigability of certain streams in Kansas the court said that there is no constitutional right to trial by jury in such a case; that the question is one of local law and "the fact is of a kind that should be established once for all, not perpetually retried."

In *Wear* v. *State of Kansas*, 245 U. S. 145, the Supreme Court of the United States after holding that there is no constitutional right to a trial by jury on an issue of fact as to the navigability of a stream, and that if a state court takes upon itself to know without evidence, whether the principal stream of the state is navigable at the capitol of the state, the Supreme Court certainly cannot pronounce it error, declared that in this respect navigability is a question of state law.

This applies with peculiar force to the decision of this case. The State of Oklahoma, in its plea of interven-

tion, and the defendants in their answer alleged that the Arkansas River is a navigable stream under the laws of the State of Oklahoma. The parties filed a written stipulation to the effect that any part of the testimony contained in the record on appeal to the Supreme Court of the State of Oklahoma in the case of *State of Oklahoma* v. *Nolegs* (decision reported in 139 Pac. 943) so far as the same may be material, may be read in evidence on the trial (Tr. 137-138). The transcript shows that a large part of the testimony in the Nolegs case was read in evidence in the court below, and the decision of the trial judge shows that he considered the decision of the Supreme Court of the State in determining the issues involved. It thus appears that the decision of the Supreme Court of Oklahoma, holding the Arkansas River to be navigable throughout the state, and the title to the bed of the river is in the state was duly presented to the trial court and that it was ignored upon the ground that the question involved was one of general law on which the court should exercise an independent judgment.

If the trial court was right in holding that the question of navigability, so far as concerns the title to the bed of the stream, was solely a question of fact to be determined under the general law, then the Supreme Court in the Wear case and in the Donnelly case holding to the contrary, was wrong. The two views of the law cannot prevail.

The Circuit Court of Appeals however went wide of the mark in holding that if navigability is a question of local law of the State of Oklahoma, and if by the local law, as evidenced by the decision of the Supreme Court in the Nolegs case, the Arkansas River is a navigable stream, that rule does not apply to this case, because the rights of the Osage tribe and of its grantor the Cherokee tribe

ntedate the admission of the State of Oklahoma into he Union.

hat court points out what it says is an exception to the ule that the determination of the navigability of the treams is a matter of local law to be determined by the ecisions of the state in which the streams are located. eferring to this exception, the court said that it applies hen transactions have been had, contracts, grants, or onveyances have been made, and rights have thereby ac-rued and vested in a state of the laws and under the rules f property under which such rights are valid and enforce-ble, and the claim is asserted that by decisions of state ribunals subsequent to the accrual of such rights a dif-erent rule of property and state of law has been created. nd speaking with particular reference to the title of the sage tribe in the bed of the river, the court states:

> "Now the right and title of the Osage Tribe to the bed of the river north and east of the thread of its main channel and to the oil and gas therein at the place of the leased premises accrued and vested in its predecessor in interest, the Cherokee Nation, on December 1, 1838, under the patent of the United States of that date and the treaties between the United States and the Cherokee Nation of May 6, 1828 (7 Stat. 311), of February 14, 1833 (7 Stat. 414, 415, 416), and of December 29, 1835 (7 Stat. 478) in execution of which that patent was made and delivered. By its express terms the grant of that patent conveyed a tract of land which included within its boundaries both banks of the Arkansas river and the land under it at the place of the leased premises. This right and title of the Cherokee Nation to the portion of the bed of the river here in controversy which lies north and east of the main channel of the river was conveyed and confirmed to the Osage Tribe by the Act of Congress of June 5, 1872 (17 Stat. 228, 229), and by the deed of the Cherokee Nation to that tribe

of June 14, 1883, which was made in performance of the treaty between the United States and the Cherokee Nation of July 19, 1866 (articles 15 and 16, 14 Stat. 799), of the Treaty between the United States and the Osage Tribe of September 29, 1865, and of the act of Congress of July 15, 1870 (16 Stat. 362). So it was that the title and rights of the Osage Tribe to the property in controversy accrued and vested in its predecessor in interest more than 70 years before the local rule of property counsel for the state invoke to the effect that the Arkansas river is navigable in law although it is not and has never been navigable in fact was declared in the region where the property in controversy is situated. There was no such rule of law in the region where the leased premises are situated when the right and title claimed by the Osage Tribe accrued and vested in the Cherokee Nation in 1838, or when it was confirmed to and vested in the Osage Tribe in 1872 and 1883. At those times and long after the established and prevailing rules of law were that the navigability of this river was a question of fact determinable by the evidence under the definition of navigability already discussed, and the decision and opinion of the Supreme Court of Oklahoma in the Nolegs case has not relieved the national courts of the duty to consider and determine the claims to the premises in controversy arising under the patent, the treaties, and the deeds under which the Osage Tribe claims according to their opinions as independent tribunals."

It seems to us that the Circuit Court of Appeals took a superficial view of the fundamental question involved, and overlooked the fact that ever since the adoption of the Constitution of the United States, and the establishment of the policy of the United States of admitting co-equal states into the Union, there has been in force in this country an elementary principle, that all the public domain of the

United States was acquired and has been held for the purpose of incorporating it at some time into a state to become a part of a federal union, that the new states to be incorporated into the Union should have equal constitutional right and power with the old states; that among the attributes of the new state as a part of their sovereignty, is the principle that immediately upon their admission into the Union, they become the owners of the title to and municipal sovereignty in the beds of their navigable streams and that the determination of the question as to whether the streams within the limits of the state are navigable is a matter of local law to be determined primarily by the states, and that this principle or doctrine ante-dates the origin of the Cherokee title to the land in controversy in 1838 as well as that of the Osage tribe in 1883.

In this connection we invite the attention of the court to the fact that the part of the Arkansas River involved here is within the Louisiana Purchase and that the United States solemnly agreed in the treaty ceding it that the lands embraced in the purchase should be admitted into the Union according to the principles of the federal constitution. Speaking on this point, the United States District Court for the Eastern District of Oklahoma, in *United States* v. *Mackey*, 214 Fed. 137, in holding that a grant to the Creek Nation in all respects analogous to the grant to the Cherokee Nation did not convey the title to the bed of the Arkansas river, said:

> "Did the grant to the Creek Nation by the patent of August 11, 1852, convey to that nation the same title and interest in the bed of the Arkansas river as it acquired by the patent in the uplands covered by the patent?

"The land conveyed by this patent was a part of the "Louisiana Purchase." By article 3 of the Treaty between the United States and France, concluded April 30, 1803 (see 8 Stat. p. 202), under the terms of which the lands comprising the Louisiana Purchase were acquired by the United States, it was provided that:

" 'The inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted as soon as possible according to the principles of the Federal Constitution.'

"By the act of May 18, 1796, c. 29 Sec. 9, 1 Stat. 468, now Section 2476 of the Revised Statutes (U. S. Comp. St. 1901, p. 1567), it was provided:

" 'All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed to be highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.'

"By the Act of March 3, 1811, c. 46 Sec. 12, 2 Stat. 606, now section 5251, Revised Statutes (U. S. Comp. St. 1901, p. 3522) it was provided:

" 'All the navigable rivers and waters in the former territories of Orleans and Louisiana shall be and forever remain public highways.' "

"In *Pollard* v. *Hagan*, 3 How. 212, 11 L. Ed. 565, it is said:

" 'We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed, *except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia Legislatures, and the deeds of cession executed by them to the United States, and*

the trust created by the treaty with the French Republic of the 30th of April, 1803, ceding Louisiana.'

"In *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 21 L. Ed. 798, it is said of the title to the bed of San Francisco Bay:

" 'Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future state. Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government. * * *'

"If, as is now settled, the United States held the bed of this navigable stream in trust for the future state, it is very doubtful whether Congress had the power to provide for a grant thereof to the tribe for a purpose other than those above mentioned as being within its power. By recent familiar legislation Congress has provided for the eventual dissolution of this tribe, and the division of a large portion of its land among the members, and the sale of the surplus, so as to dispose of all tribal lands. In order to accomplish this, it was necessary to survey and subdivide the tracts in like manner as public lands are divided. By Act of Congress of April 7, 1864, c. 48, R. S. Sec. 2115, it is provided:

" 'Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same

shall be surveyed under the direction and control of the general land office, and as nearly as may be in confirmity to the rules and regulations under which other public lands are surveyed.'

"It is significant that when Congress came to make this survey the Arkansas river was treated as a navigable stream and meandered, not being included with the survey. This is a construction of the grant by the officers of the government consistent with the conception that it was never intended that the bed of the stream should pass to the tribe, but was reserved and continued to be held in trust for the future state. I conclude that the Creek Nation by virtue of its patent acquired no right or title to the bed of the Arkansas river between high-water marks, but that the same continued to be held by the United States in trust for the future state until the advent of statehood November, 16, 1907, when it vested in the state of Oklahoma, subject to whatever rights, if any, the local state law, statutory or common, gave to owners of land bordering on the stream."

The trust under which the United States held the territory embraced in the Louisiana Purchase has been executed. It has all been embraced within states admitted into the Union according to the principles of the federal constitution. The new states thus admitted into the Union possess the same title and municipal sovereignty in the beds of navigable streams as the old states possess.

The Circuit Court of Appeals overlooked the fundamental fact that all tribal governments and grants of land to Indian tribes are temporary in their nature, to terminate whenever Congress decides to incorporate the given territory into a state. The paramount title to tribal lands is always in the United States, subject to disposition at the will of Congress.

Cherokee Nation v. *Hitchcock*, 187 U. S. 294, 47 Law Ed. 163.

Lone Wolf v. *Hitchcock*, 188 U. S. 553, 47 Law Ed. 299.

In the latter case the court said:

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations (Chinese Exclusion case, 130 U. S. 581, 600, 32 L. Ed. 1068, 1073, 9 Sup. Ct. Rep. 623), the legislative power might pass laws in conflict with treaties made with the Indians. *Thomas* v. *Gay*, 169 U. S. 264, 270, 42 L. Ed. 740, 18 Sup. Ct. Rep. 340; *Ward* v. *Race Horse*, 163 U. S. 504, 41 L. Ed. 244, 16 Sup. Ct. Rep. 1076; *Spalding* v. *Chandler*, 160 U. S. 394, 40 L. Ed. 469, 16 Sup. Ct. Rep. 360; *Missouri, K. & T. R. Co.* v. *Roberts*, 152 U. S. 114, 38 L. Ed. 377, 14 Sup. Ct. Rep. 496; Cherokee Tobacco, 11 Wall 616, *sub non.* 207 *Half Pound Papers of Smoking Tobacco* v. *United States*, 20 L. Ed. 227."

The admission of Oklahoma into the Union pursuant to authority conferred on Congress by the constitution, was the exercise of the highest political power, and had the necessary effect of repealing all previous acts of Congress or treaties with Indian tribes inconsistent with the constitutional statute of the state as a member of the Union, equal in all respects to the original states. Among the laws and treaties thus abrogated, are the acts of Con-

gress and the treaties between the Cherokees and the Osages and the United States, which attempted to vest in these tribes or either of them, any rights in the bed of the Arkansas River, if any such attempt was made.

If during the territorial conditions, the Cherokees and Osages had any rights in the bed of the Arkansas River, those rights ceased upon the admission of the states into the Union; for clearly it will not be held that these tribes of Indians could, after the admission of the state into the Union, exercise police power or municipal sovereignty in the bed of the river. The only competent authority to exercise these powers in the bed of the river, after the admission of the state, is the state itself.

We also submit that the Circuit Court of Appeals overlooked the principle that on the admission of the people of a given territory into the Union as a state by necessary implication, all previous laws and Indian treaties which are inconsistent with the absolute equality of the new state thus created are ipso facto repealed.

In the case of *Permoli* v. *Municipality No.* 1 *of the City of New Orleans*, 3 How. 589, 11 Law. Ed. 739, this court in speaking of the effect of the admission of the State of Louisiana into the Union on certain laws enacted by Congress while Louisiana was a territory and certain ordinances passed by the City of New Orleans after the admission of the State of Lousisiana, claimed to be in violation of the previously enacted laws of Congress, said:

> "In the ordinance, there are terms of compact declared to be thereby established between the original States, and the people of the States afterwards to be formed northwest of the Ohio, unalterable, unless by common consent—one of which stipulations is, that

'no person demeaning himself in a peaceable manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.' For this provision is claimed the sanction of an unalterable law of Congress; and it is insisted the city ordinances above have violated it; and what the force of the ordinance is north of the Ohio we do not pretend to say, as it is unnecessary for the purposes of this case. But as regards to the State of Louisiana, it has no further force, after the adoption of the State constitution, than other acts of Congress organizing, in part, the territorial government of Orleans, and standing in connection with the ordinance of 1787. So far as they conferred political rights, and secured civil and religious liberties (which are political rights), the laws of Congress were all superseded by the State constitution; nor is any part of them in force, unless they were adopted by the constitution of Louisiana as laws of the State."

In the case of *Benner* v. *Porter*, 9 How. 236, 13 Law. Ed. 119, this court in speaking of the effect of the admission of Florida into the Union on acts of Congress in force during the territorial condition, said:

"We think it clear, therefore, that on the unconditional admission of Florida into the Union as a State, on the 3d of March 1845, the territorial government was displaced, abrogated, every part of it. * * *

"Without, then, pursuing the examination further, we are satisfied that, in any aspect in which the question can be viewed, whether we look at the effect of the act of Congress admitting the Territory of Florida, as a State, into the Union with her constitutional and organized government under it, alone or in connection with the establishment of a federal court within her limits, her admission immediately, and by constitutional necessity, displaced the territorial government, and abrogated all its powers and jurisdiction. The

> State authority was destructive of the territorial; and, in connection with the establishment of the federal jurisdiction, the organization of the government, State and federal, under tho Constitution of the Union, became complete throughout her limits. No place was left unoccupied for the territorial organization."

See also for an exhaustive discussion of this question, the case of *Coyle* v. *Smith*, 28 Okla. 121, 113 Pac. 944.

In the case of *Ward* v. *Race Horse*, 163 U. S. 505, 41 Law Ed. 245, the question was whether the provisions of a treaty between the United States and the Bannock Indians giving them the right to hunt on the unoccupied lands of the United States so long as game may be found thereon and so long as peace existed between the whites and Indians on the boundaries of the hunting district, was abrogated by the admission of the State of Wyoming into the Union. The treaty took effect February 24, 1869. Wyoming was admitted into the Union July 10, 1890. Section 1 of the Act admitting the State provides as follows:

> "The State of Wyoming is hereby declared to be a state of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original states in all respects whatever; and that the Constitution which the people of Wyoming have formed for themselves be, and the same is hereby accepted, ratified and confirmed."

In 1895 the legislature of that State passed an act regulating the killing of game within the State, which contravened the provisions of the treaty of 1869. Race Horse, a member of the Bannock tribe of Indians was arrested charged with violation of the State statute. He sued out a writ of habeas corpus before the United States Circuit

Court for the District of Wyoming and was discharged. From the order discharging him, the Sheriff of Unita County in the State of Wyoming, having him in charge, appealed to this court. This court held that by the act of Congress admitting Wyoming into the Union, the provision of the treaty giving the right to hunt was repealed.

On this point after citing *Pollard* v. *Hagan*, 44 U. S. 212, 11 Law Ed. 655; *Permoli* v. *Municipality No. 1 of New Orleans*, 44 U. S. 589, 11 Law Ed. 739; *Withers* v. *Buckley*, 61 U. S. 84, 15 Law Ed. 816 and *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678, 27 Law Ed. 442, and quoting at length from them, the court said:

> "A like conclusion was applied in the case of *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 31 Law Ed. 629, where the act admitting the state of Oregon into the Union was construed.
>
> "Determining, by the light of these principles, the question whether the provision of the treaty giving the right to hunt on unoccupied lands of the United States in the hunting districts is repealed, in so far as the lands in such districts are now embraced within the limits of the state of Wyoming, it becomes plain that the repeal results from the conflict between the treaty and the act admitting that state into the Union. The two facts, the privilege conferred and the act of admission, are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as co-existing. * * *
>
> "The enabling act declares that the state of Wyoming is admitted on equal terms with the other states, and this declaration, which is simply an expression of the general rule, which presupposes that states, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the states already admitted, repels any presump-

> tion that in this particular case Congress intended to admit the state of Wyoming with diminished governmental authority. The silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians, is given increased significance by the fact that Congress in creating the territory expressly reserved such rights. Nor would this case be affected by conceding that Congress, during the existence of the territory, had full authority in the exercise of its treaty making power to charge the territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a territory it would be also within the power of Congress to continue them in the state, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the state, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission."

The court then for the sake of argument, conceded that where rights that are granted by Congress during the existence of a territory are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the state, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct.

It is then pointed out that the hunting privileges conferred on members of the Bannock Indian tribe were not such as to imply their continuance after the admission of the state; that they did not constitute a perpetual right created by the treaty and that therefore the hunting privileges ceased, when, on the admission of the State of Wyoming into the Union, the United States lost control of the subject of regulating hunting within the state.

We submit that under the authorities already cited, the right to own the beds of navigable streams and to exercise police power therein, is of such nature that it cannot be said Congress intended to withhold it from the future state which should embrace the territory traversed by the Arkansas River.

This right is the right possessed by all the states in the Union as an incident to their sovereignty. In order to be equal to the old states, each new state on its admission into the Union, at once becomes possessed of the ownership of and municipal sovereignty in the beds of navigable streams.

If, as said by this court in *Illinois Central Railway Company* v. *Illinois* (*supra*) the title of the state to the beds of navigable streams

> "is a title different in character from that which the state holds in the lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein free from obstruction or interference of private parties,"

and if, as further stated by this court in that case,

> "the State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interests in what remains, than it can abdicate its police powers in the adminis-

> tration of government and the preservation of the peace,"

then clearly it could not be claimed that Congress intended to withhold these powers from the state, and confer them on the Indian tribes. It would be an incongruous situation, never contemplated by Congress, if the Osage Indians should be held to possess the bed of the Arkansas River with the incidental police power and municipal sovereignty therein, which, according to the decisions of this court, are inseparably connected with the ownership of the beds of such streams.

We submit that the Circuit Court of Appeals overlooked the character of rights which pertain to the ownership of the beds of navigable streams, and overlooked the fact that if, by the decision in this case, the state is deprived of the ownership of the bed of the Arkansas River, it necessarily follows that Oklahoma entered the Union degraded and un-equal to her sister states.

We invite attention to the decision of this court in the case of *Coyle* v. *Smith,* 221 U. S. 559, 55 Law Ed. 853, where, according to the first and second paragraphs of the syllabus, the court held:

> "1. The power of Congress under U. S. Const. Art. 4, Sec. 3, to admit new states into the Union, extends only to their admission on an equal footing with their sister states.
>
> 2. The constitutional duty of guaranteeing each state in the Union a republican form of government gives Congress no power to impose restrictions in admitting a new state into the Union which deprive it of equality with the other states."

That case involved the construction of the provisions in the Oklahoma Enabling Act providing that the capital of the State shall temporarily be at the City of Guthrie and shall not be changed therefrom previous to 1913, but that after that year the capital should be located by the electors of the state at an election provided for by the legislature. On December 29th, 1910, the legislature passed an act locating the capital at Oklahoma City, and the question involved was, which of these acts was valid —the Congressional Act prohibiting the state from removing its captal from Guthrie before 1913, or the Act of the State Legislature removing the capital from Guthrie and locating it at Oklahoma City. In holding the Act of Congress unconstitutional and the Act of the State Legislature valid, this court citing many of the authorities referred to in this brief and many others, announced the two propositions referred to in paragraphs one and two of the syllabus above quoted.

After citing the case of *Permoli* v. *New Orleans*, 3 How. 589, 11 Law Ed. 739, the court holds that by no previous act of legislation Congress could project its authority into the new state upon a matter of local police regulation, which would deprive the state of its equity with the other states in the Union. The court then cites the case of *Pollard* v. *Hagan*, 3 How. 212, 11 Law Ed. 565, where it was held that since the people of the original states hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights conferred on Congress by the Constitution, Alabama, which was a new state also owned the beds of navigable streams and the soils under them.

The court concluded its reference to that case with this important declaration:

"The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission."

After referring to a large number of cases which relate to the ownership by the new states of the beds of navigable streams, all holding that in order for the new state to be equal to the old states they must, as a matter of constitutional necessity, possess the same ownership and municipal sovereignty in the beds of navigable streams that are possessed by the old states, the court said:

"If anything was needed to complete the argument against the assertion that Oklahoma has not been admitted to the Union upon an equality of power, dignity, and sovereignty with Massachusetts or Virginia, it is afforded by the express provision of the act of admission, by which it is declared that when the people of the proposed new state have complied with the terms of the act, that it shall be the duty of the President to issue his proclamation, and that 'thereupon the proposed state of Oklahoma shall be deemed admitted by Congress into the Union under and by virtue of this act, on an equal footing with the original states. The proclamation has been issued and the Senators and Representatives from the state admitted to their seats in the Congress.'

"Has Oklahoma been admitted upon an equal footing with the original states? If she has, she, by virtue of her jurisdictional sovereignty as such a state,

may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot.

"In *Texas* v. *White*, 7 Wall. 700, 725, 19 L. ed. 227, 237, Chief Justice Chase said in strong and memorable language that 'the Constitution, in all of its provisions, looks to an indestructible Union composed of indestructible states."

The Circuit Court of Appeals concedes that the principle decided in the cases of *State* v. *Nolegs; State v Akers* and *United States* v. *Mackey,* is applicable to this controversy, and that the rights and title to the bed of the Arkansas River asserted in those cases adverse to the rights or title of the state, were derived from grants or conveyances made before the respective states were admitted. But it is said:

"It seems to us that in those cases insufficient consideration and weight were given to the existing law, the facts and circumstances surrounding the parties to the original grants by the United States at the time they were made, respectively, etc."

We submit however that the Circuit Court of Appeals in this case committed the error it attributes to the Supreme Court of Oklahoma, the United States District Court for the Eastern District of Oklahoma, and the Supreme Court of Kansas, in that it overlooked the fact that long before the Cherokee and Osage claims to the river bed originated, the United States was under obligation to create out of the territory through which the Arkansas River runs, a state to be admitted into the Union according to the principles of the federal constitution, and that the Circuit Court of Appeals gave insufficient consideration to the fact that this new state, when admitted, must

possess the ownership of the municipal sovereignty in the beds of the Arkansas River, in order to possess the required equality with the old states.

The trial court agreed with the three courts above named and differed flatly with the Circuit Court of Appeals on this subject, and held that if the Arkansas River is navigable, the tribes had no title.

We submit also that the Circuit Court of Appeals gave insufficient consideration to the decision of the Supreme Court of the United States in the case of *Wear* v. *Kansas*, 245 U. S. 154, 62 Law Ed. 214, and esepecially when that court undertakes to limit the effect of that decision by declaring that

> "The only question really decided by the Supreme Court was that, where the highest tribunal of a state, in that case of the state of Kansas, 'takes upon itself to know without evidence whether the principal river of the state is navigable at the capitol of the state, we certainly cannot pronounce it error' ".

It is then stated that the record before the Supreme Court of the United States in that case did not require it to and it did not consider whether or not on all the evidence and the law, the river was navigable.

The great question decided in the Wear case, was that navigability of a stream, as affecting the title to the bed of the stream, is a local question to be determined under the laws of the state, and that the decision of the Supreme Court of the State on that question is binding on all other courts. Hence when the Supreme Court of Kansas, on record before it, declared the Arkansas River navigable, the Supreme Court of the United States held that decision to be binding. So, in this case, the Supreme Court of the

State of Oklahoma having, on a full hearing of the law and the evidence, determined that the Arkansas River is a navigable stream, and that the title to the bed of the stream belongs to the State of Oklahoma, we insist that this decision is binding on this court.

II.

The trial court and the Circuit Court of Appeals should have held the Arkansas River navigable, and erred in not holding it navigable under the laws of the United States within the ruling announced by this court in the Montello, 20 Wall. 430, 22 Law Ed. 391, and the case of Economy Light & Power Co. v. United States, decided April 11, 1921.

A great amount of testimony was introduced on the trial of the case on the subject of navigability. Much of it consists of the opinions of government experts, civil engineers and persons who had actively navigated the river. Running through the testimony offered by the government the statement is frequently made by the government experts that if the water should be concentrated into a single channel of 200 or 300 feet width, there could be maintained a depth of from 2½ to 3 feet, in that part of the river lying between Fort Gibson and Arkansas City, Kansas. (See Transcript pages 273-276-280-281-282-297-309-310-328-372-458-484-486-488-489-494).

We also invite the consideration of the court to the testimony of Thomas Beard at Page 617 of the Transcript, and also of C. W. Swartz at page 621 of Transcript, and of John W. Ortner at page 623 of Transcript, where he testified on the trial of the Nolegs case, which was introduced in the court below on this case, that he had been in the mill business and also in the stock business at Cleveland, marketing his products mostly at Tulsa; that he

built a boat and hauled some of his products by boat, the boat being 9 x 42 feet, and would carry about 60 or 70 hogs weighing 200 pounds each. He also shipped walnut gun stocks, but no products from the mill. When the river was high he had made the trip from Cleveland to Tulsa in half a day; the distance between the two places being from fifty to sixty miles, and he operated his boat from about May until the latter part of July; that he used his boat for about two years on the river, making from three to six trips a season. On the return trip from Tulsa, witness stated he would bring merchandise to the merchants at Cleveland; the engine of his boat was six horse power.

At page 629 of Transcript is the testimony of Austin Randel, who testified in the Nolegs case, that he lived at Cleveland since 1893; that he was acquainted with the condition of the Arkansas River around Cleveland, and that his experience with the river consists of seining, fishing, rafting logs, running ferry boat and other boats, that he rafted logs in the river about seven years ago on a two foot rise in the river to a point to where he wanted to cut them into shingles.

The testimony of E. C. Carter appears on page 632 of the Transcript. He also testified in the Nolegs case, and his testimony was introduced in this case on the trial below. He said that in 1908 he made a trip on the Arkansas River from Cleveland to the mouth of the river in a gasoline boat 26 feet long and 6 feet beam with 18 inches draught, and a six-horse power engine. On this trip witness was accompanied by his cousin as far as the mouth of the river; he did not stop at the mouth of the Arkansas River, but went on to Vicksburg, Mississippi, in the boat.

He left Cleveland about the month of May at a low stage of water.

There is much more testimony in the record tending to show that the river is navigable in its natural state. We have not undertaken to set it out in this case, but invite the court to read the same.

In *The Montello, supra,* the rule announced is:

> "The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which the rafts of lumber of great value are constantly taken to market. It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true creation of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway."

This rule was reaffirmed in the case of *Economy Light & Power Company* v. *United States,* wherein the opinion was rendered April 11, 1921.

The rule announced by the trial court in this case as to the test of navigability is:

> "The issue of the navigability of a stream is one of fact, and, when used or susceptible of use in its ordinary condition as a highway of trade and travel in

the customary modes on water, a stream will be deemed navigable."

In the Circuit Court of Appeals, according to the first paragraph of the syllabus, it is said:

> "The test of navigability in fact of a stream is whether in its natural condition it is used or capable of use for the ordinary purposes of trade and travel by water and for carrying to market the products of the country through which it runs."

The Circuit Court of Appeals, however, after citing *The Montello case* and others says:

> "Counsel for the appellants argue that this rule was erroneous in that it failed to declare that a stream is navigable if it can be so improved as to make it useful as a highway of travel and transportation. But it is obvious that the modification of the test adopted by the court by the insertion or addition of such a declaration would immediately raise the question whether or not a stream is navigable which was not, but might be made useful for transportation purposes, etc."

We submit that the rule announced by the lower courts in this case, has to a certain extent been modified by the rule announced by this court in *Economy Light & Power Co.* v. *United States, supra,* as shown by the first paragraph of the syllabus which reads as follows:

> "The artificial obstructions exist in a stream capable of being abated by due exercise of public authority, does not prevent the stream from being regarded as navigable in law, or take away the authority of Congress to prohibit added observations, if, supposing them to be abated, it be navigable in fact in its natural state."

The testimony in this case shows that the Arkansas River by proper improvements, could be made navigable by vessels of light draft. We call attention to the fact that in the case of *Economy Light & Power Company*, the question was whether the Desplaines river was a navigable water of the United States. This court in that case held that the decision of the Supreme Court of Illinois in *People* v. *Economy Light & Power Company*, 240 Ill. 290, 89 N. E. 760, holding that the Desplaines river is not a navigable stream, to which case the United States was not a party, was not adjudicata, and that this court is not bound by the decision in that case.

As pointed out by this court in *Wear* v. *State of Kansas*, 245 U. S. 145, what are navigable waters of the United States within the meaning of the act of Congress, in contradiction to the navigable waters of the states, depends upon whether the stream in its ordinary condition affords a channel for useful commerce.

After citing a number of cases in support of that view, the court said:

> "But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several states."
>
> *Donnelly* v. *U. S.*, 228 U. S. 243, 57 L. Ed. 820, *Archer* v. *Greenville Sand & Gravel Co.*, 233 U. S. 60, 58 Law Ed. 850.

III.

The trial court and the Circuit Court of Appeals erred in not holding that the Arkansas River is a navigable water of the United States, and that it is navigable as a matter of law.

The controlling question under this proposition is that the courts below erred in refusing to hold that the Arkansas River was a navigable stream under the laws of the United States, and that by reason of numerous acts of Congress and the general course of the War Department and other departments of the United States government, the Arkansas River had long prior to statehood and since statehood been impressed with a navigable character and condition to such an extent that the navigability of the stream is no longer a question of fact to be determined by the decision of the court in a particular case, and that the court in this case should treat it as navigable as a matter of law.

It will be noted from the finding of fact quoted above that the trial court reduced the question of navigability to a pure question of fact, and because the evidence failed to show that the river was or had been susceptible of commerce in its ordinary condition as a highway of trade and of travel in the customary modes on water, he held it to be a non-navigable stream.

The trial court refers to acts of Congress making appropriations for improvement of the Arkansas River and granting the rights to railroad companies and construction companies to build bridges across the river and holds that they are insufficient to establish the navigability of the stream. He said that in general such acts should be assigned weight in view of the power of legislative inquiry and judgment, but that their force is not to declare a stream navigable in its natural state and that none of the acts of Congress referred to purport to declare the river navigable. (Transcript page 778.)

The second section of an act of Congress authorizing the Cleveland Bridge Company to construct a bridge across the Arkansas River between Pawnee, Oklahoma, and the Osage Indian Reservation at Cleveland, approved February 17, 1897, 29 Stat. at L. 531, is characteristic of the acts of Congress on the subject:

> "That the bridge constructed under this act shall be a lawful structure, and shall be recognized as a post route, upon which no charge shall be made for the transmission over the same of the mails, troops and the munitions of war of the United States, and equal privileges in the uses of said bridge shall be granted to telegraph companies, and the United States shall have the right of way across said bridge and approaches for postal purposes. Provided, that before the construction of any bridge herein authorized is commenced the said company shall submit to the Secretary of War for his examination and approval, a design and drawing of such bridge and map of the location giving sufficient information to enable the Secretary of War to fully and satisfactorily understand the subject, and unless the plan and location of such bridge are approved by the Secretary of War the structure shall not be built; provided, further, that any bridge constructed under the authority of this act shall at all times be so kept and managed as to offer reasonable and proper means for the passage of vessels and other water craft through or under said structure, and for the safety of vessels passing at night there shall be displayed on such bridge, from sunset to sunrise, such lights or other signals as may be prescribed by the Light-House Board (29 Stat. L. 532.)"

The report of the chief of engineers of the War Department for the fiscal year 1897 contains the following:

"The project and estimate for the improvement of
river was made in three parts: Annual Report Chi
Engineers 1887, page 1603 for improving Arkansas R
from Little Rock to mouth $2,533,544; Annual Repor
Chief of Engineers 1888 page 1386, for improvement
tween Ft. Gibson and Little Rock at a cost of $1,307,9
and House Document No. 90, 49th Congress, first se
for improvement between Arkansas City, Kansas, and
Gibson, $1,696,900; the Act of August 11, 1888, ad
project for improving Arkansas River from Wich
Kansas, to the mouth, mentioning distinctly the pl
which include the estimates from Little Rock to the mo
and from Ft. Gibson to Arkansas City, Kansas, and by
plication approves the estimate for improvements betw
Little Rock and Ft. Gibson. No estimate has been mad
approved for the improvement of the river between
kansas City, Kansas, and Wichita, Kansas" (Transc
372-373).

The record contains reference to various other A
of Congress, of the contents of which, of course, the co
take judicial notice, including all those Acts of Cong
which were referred to in the case of *Hurst* v. *Dana*,
Kan. 947, 122 Pac. 1041, and in *State* v. *Akers*, 92 Kan.
140 Pac. 637, as well as those referred to in the Nol
case.

We do not deem it necessary to refer in details to
contents of these Acts of Congress further than to say t
in a general sense they all recognize the navigability
the Arkansas River. In addition to the course of legi
tion on the part of the Congress of the United States,
trial court had before it, as has also this court, a kno
edge of the general characteristics of the Arkansas Ri
This court knows that the Arkansas River is one of
great tributaries of the Mississippi River; that it i
meandered stream throughout Oklahoma and the State

Kansas, and that it is practically two thousand miles in length and drains nearly two hundred thousand square miles of territory.

The attention of the court has already been called to the letter by the Acting Secretary of War, dated October 11, 1911, in which he states that it appears from the records of the engineer authorities i nthe War Department that the Arkansas River in Osage County, Oklahoma, is a navigable water-way within the purview of the laws enacted by Congress for the preservation and protection of such waters (Transcript 596).

The record contains a large amount of correspondence between the War Department and the Department of Justice on the subject of the navigability of the Arkansas River. It appears from this correspondence that the Department of Justice made a strenuous effort to induce the War Department to recall the statement contained in the letter of October 11, 1911, that the Arkansas River along the border of the Osage Reservation was a navigable stream, but the War Department persistently refused to comply with the request.

On Sept. 16, 1914, Hon. Lindley M. Garrison, Secretary of War, caused to be prepared for the Department of Justice certain memoranda on the navigability of the Arkansas River as follows:

"Department of Justice, Sep. 28, 1914. Attorney General's office. R. E. P.

"War Department.
"Washington, September 16, 1914.

"HT/JES

"Memorandum for the Department of Justice in re Arkansas River.

"With respect to the question of the navigability of the Arkansas River, the Attorney General, in his letter of the 19th ultimo, claims that the statements made in War Department letters of October 11, 1911, and May 13, 1914, are not supported by the reports of examinations and surveys published in certain Congressional documents, and asks for a further consideration of the matter, and for a further expression of the views of the War Department.

"The question at issue is whether the Arkansas River where it borders on the Osage Indian Reservation, in Osage County, State of Oklahoma, is navigable. In the aforesaid letters it was stated that the War Department held that this section of the river is a navigable waterway, within the meaning of the laws enacted by Congress for the preservation and protection of such waters; and this statement is claimed to be at variance with the information and the data set forth in the aforesaid printed reports.

"It is well settled by decisions of the Supreme Court that the question of navigability is one of fact, a river being navigable *in law* when it is navigable *in fact*. The question whether the Arkansas River at the locality mentioned is navigable does not depend upon the declaration or holding of this department, but upon the actual facts as they now exist. The War Department is not vested with the power to fix the status of this or any other stream, nor to determine conclusively the question of navigability. The statement to which the Department of Justice excepts is merely an expression of the War Department's opinion, based upon the facts at hand, that this section of the river is navigable and that these facts are such as to justify the application

of the laws of Congress thereto; but this opinion is not conclusive. The Department of Justice might reach a different conclusion from the same state of facts; or, if the War Department should try to apply and enforce the law by judicial process, the courts might hold adversely on the ground that the Department's conclusion was erroneous, and not justified by the facts.

The Arkansas River is one of great length, large volume, and of varied and varying characteristics. No definite survey or detailed examination of the upper sections of the stream has been made in recent years, and the information as to present conditions is by no means full or accurate. The present head of steamboat navigation is generally admitted to be the mouth of Grand River near Fort Gibson, Okla., but the capacity for steamboat navigation is not alone the determining factor in fixing the limit of a stream's avigability, as there are other forms of navigation, such as flatboats, rafts, and even the floating of loose logs, and a river capable of only these kinds of navigation may be classed as a navigable waterway. Moreover, in deciding whether it must hold *prima facie* that a stream is navigable, the War Department must sometimes be governed by other considerations in addition to those of supposed navigble conditions, such, for instance, as acts of Congress or court decisions.

"Briefly stated, the position of the War Department, as expressed in the aforesaid letters, with respect to the section of the Arkansas River bordering on the Osage Reservation, was based, to a large extent, on the following considerations:

"1. That Congress, in the river and harbor act of March 3, 1879, made an appropriation for improving Arkansas River between Fort Smith, Ark., and Wichita, Kan., a section which includes the Osage Indian Reservation, the latter point being about 208 miles above the said reservation. This appropriation was based on a report published in House Ex. Doc. No. 94, Forty-fifth Congress, Third Ses-

sion, and with the money appropriated a snagboat worked up to the vicinity of a point known as 'Paunee Agency,' about twenty miles above the reservation.

"2. In the river and harbor act of August 11, 1888, Congress adopted a comprehensive project for the improvement of Arkansas River from its mouth to Wichita, Kan., and made specific appropriations therefor.

"3. Again, in the river and harbor act of September 19, 1890, Congress appropriated $180,000 for improving the river from Wichita, Kan., to its mouth. And, further, made a specific appropriation of $20,000 for operating snagboats and removing obstructions from the river between the mouth and Wichita.

"4. In the river and harbor acts of 1892, 1896 and 1899, further appropriations were made for the improvement of the river in accordance with the aforementioned project.

"With the exception of the first item of appropriation, these moneys were all expended on that section of the river between the mouth and Grand River, which is below the Osage Indian Reservation. But it goes without saying that, if the condition and capacity of the stream above the Indian Territory, or what is now the Oklahoma State boundary line, were such as to cause Congress to adopt a systematic scheme for its improvement, and to make appropriations extending over a period of more than fourteen years, the War Department, on this account alone, it not only justified in holding, but cannot do otherwise than hold that this portion of the river is a navigable waterway and subject to the laws of Congress.

"The War Department is advised of the important litigation to which the Department of Justice refers as depending on the question of the navigability of the river; and recognizing that the question is, in the last analysis one of present fact, to be established by proof and not by opinion, has refrained from any recent action or expression that

might embarrass or hinder the successful conduct of that litigation. All the reports on examinations and surveys of the river, and all the information and data available in this department have been made accessible to the representatives of the Department of Justice. Upon these facts this department came to the views heretofore expressed in the letters of October 11, 1911, and May 13, 1914. Upon the same facts the Department of Justice may, of course, reach a different conclusion, or it may establish a different state of facts by an investigation of present conditions on the river. This department, however, sees no reason for changing its position in the matter.

"Very respectfully,

"Lindley M. Garrison,

"Secretary of War.

"79270/4 E. D." (Transcript 696-699).

March 23, 1915, the Secretary of War wrote to the Attorney General as follows, to-wit:

"War Department,

"Washington, March 23, 1915.

The Honorable, the Attorney General:

"Sir.—Your departmental telegram dated March 9, 1915, has just been brought to my attention.

"As we have informed your department upon previous occasions, the sections of the river adverted to are, in the judgment of this department, navigable waters of the United States, having been frequently so dealt with by the Congress of the United States and by the Engineering Corps of the United States Army.

"If it is desired, on behalf of whomsoever your department represents, to produce proof that these sections of these rivers are navigable waters of the United States, I will detail an officer with full knowledge to appear and testify. If, on the other hand, it is the view of your department that these sections are non-navigable, then I could not detail

anyone from the Engineer Corps of the United States Army to testify to that effect, because it would be in contravention of the records, decisions and treatment in that corps.

"If you will give me further information in the circumstances, I can act advisedly.

"159932-53 Very truly yours,
"Dept. of Justice, Lindley M. Garrison,
"Mar. 24, 1915 A. M. Secretary of War.
"Mails & Files Div.
"Files EK." (Transcript 699).

On September 10, 1915, General Dan C. Kingman prepared for the Secretary of War certain memoranda on the navigability of the Arkansas River, which is as follows:

"War Department,
"Office of the Chief of Engineers. DCK LK
"Washington.

"Address reply to
"Chief of Engineers, U. S. Army. 300010-8 W. D.
"Washington, D. C.
"Refer to File No. 79270/19
"September 10, 1915.

"Memorandum for the Secretary of War.
"Subject: In the matter of the navigability of the upper Arkansas River.

"1. Very few rivers are susceptible of safe and convenient navigation at all times and all seasons. On almost all of them navigation is impeded or prevented at certain times, due to various natural causes. Navigation may be interrupted by ice, by the force and violence of freshets, or by extremely low water due to periods of drought. The navigability, therefore, cannot be determined with certainty by an examination made at any particular time. No examination could be regarded as reliable that did not cover a complete cycle of changes.

"2. Navigation upon the Hudson River is prevented for about three months in the year on account of ice; upon the Detroit River, which has the greatest commerce of any river in the world, navigation is prevented for about five months in the year for the same reason, and upon the Yukon River, which has a navigable length of about 2,000 miles, navigation is only possible for five months of the year, but no one would question the fact that these are navigable waters of the United States.

"3. Upon other rivers, navigation is impeded or entirely prevented during periods of drouth. This is true of the Ohio River, the Tennessee River, the upper Mississippi, the Arkansas, the Savannah, and many other rivers as they were in their natural condition. But at other times, when the discharge of the river is greater, navigation is possible, and the streams are such as to lend themselves to the purposes of interstate commerce.

"4. It is not the use of the river which determines the question of its navigability, but it is its susceptibility to such use. A river flowing through a heavily timbered country will usually be made use of for the transportation of timber and forest products, and very useful navigation can be carried on by means of rafts. Another river of precisely similar size and regimen may flow through a treeless country and not be used at all, because the material to be transported is not there. This would not, however, determine the fact whether it was or was not a navigable waterway of the United States.

"5. That portion of the Arkansas River lying between Fort Gibson and Arkansas City is undoubtedly susceptible of navigation at high and intermediate stages. This is evidenced by the fact that steamboats have actually passed over it. Whether it is or is not used for the purposes of navigation and commerce during the periods when it might be so used would naturally depend upon the other means of transportation available upon the character of the people which

occupy the valley, and upon the nature of articles of commerce which they produce or consume.

"6. Congress has made forty-three appropriations of money for the improvement of the Arkansas River, amounting in the aggregate of $3,145,969.60. In eight separate cases the law has specifically named the town of Wichita, Kan., as the upper limit of improvement, and in the formal project, as set forth in House Document 90, Forty-ninth Congress, First Session, Wichita, Kan., is also fixed as the upper limit. In this same document General John Newton, then Chief of Engineers, stated in his opinion that much relief would be given to navigation at high and medium stages of the river between Fort Gibson and Arkansas City by the expenditure of about $20,000 for the removal of obstructions and the building of dikes. This covers the portion of the river under consideration, Arkansas City being in Kansas above any portion of the river lying in Oklahoma. In the report of the Chief Engineer for 1885, on page, 1611 it says:

" 'During the latter part of the fiscal year a steel steamer with a fleet of five steel barges has been put on the river from Arkansas City to Fort Gibson.'

"7. In compliance with an item on the river and harbor act of March 3, 1909, an estimate was made of the cost of improving the river from the mouth of Grand River, sixty-five miles up-stream, to Tulsa. While the project was feasible, the expenditure involved was not considered to be justified at the time. The reservation in question on the Arkansas River is in the county adjacent to Tulsa.

"8. The following is a list of officers who have been connected with the improvement of the Arkansas River since 1875. Among these will undoubtedly be found the ones best capable to testify from personal knowledge as to its character. Those marked with the cross are dead. Of the others, Major Suter, Captain Palfrey and Captain Fitch are retired from active service. Lieutenant Sibert has since been promoted to the grade of general officer. The post-office addresses of all of the living officers will be found

in a book published monthly by the Adjutant General's office, entitled, 'Army List and Directory.' Of all the living officers I consider Major M. L. Walker best competent to testify in regard to this section of the river, because he was in charge of the work for nearly two years, and during this time he made a personal examination of the section under consideration. Next to him I consider Major C. S. Smith would be the best witness, and next to him Major E. M. Markham who is at present in temporary charge of the work. In response to a telegram Major Walker wires on September 9 as follows: 'I consider Arkansas River from Arkansas City to Fort Gibson a navigable water of the United States. This is from personal knowledge of the river.' At the same time Major Smith telegraphed in response to inquiry: 'Arkansas River is navigable waterway of the United States between Arkansas City and Fort Gibson.' I do not know what the opinion of Major Markham is on the subject. I wired him, but have received no reply. Certified copies of the records of the office relating to this subject have been furnished to the Department of Justice. In view of the foregoing, I do not see how the War Department can honestly hold any other view or express any other opinion than that this particular portion of the Arkansas River is a navigable waterway of the United States. * * *

"Dan C. Kingman,

(Trans. 598-600) "Chief of Engineers, U. S. Army."

On September 27, 1915, Judge Advocate General E. H. Crowder, the chief law officer of the War Department, prepared for the Secretary of War memorandum on the position of the War Department on the question of the navigability of the Arkansas River above Grand River, which is as follows:

"War Department,
"Office of the Judge Advocate General.
"Washington. 30010/8 W. D.
"Arkansas River.
"September 27, 1915.

"Memorandum for the Secretary of War.

"Subject: Position of the department on the question of the navigability of the Arkansas River above Grand River.

"1. The acting Attorney General (Solicitor General Davis) in his letter to the President of September 3, 1915, says it seems to him that the Secretary of War has misconceived the purpose of the suits in question, which is to establish as against the State of Oklahoma and its lessees the title of certain Indians to the bed of the Arkansas in this particular locality by maintaining that the Arkansas is not navigable above the mouth of the Grand River; that the establishment of that fact would not impair the rightful jurisdiction of the Federal Government over the navigable reach of the river, inasmuch as in order to preserve that navigability the Government is entitled to the unrestricted flow of the water in the upper and unnavigable reaches (citing *United States* v. *Rio Grande Irrigation Company*, 174 U. S. 690, 698, in which the Supreme Court held that the Government is entitled to the undiminished flow of the river in its non-navigable section in New Mexico in order to protect the capacity of the navigable reach below), and says: 'The present case of the Arkansas is exactly parallel in this respect to the case of the Rio Grande.'

"The Acting Attorney General also gives it as his view that it is not within the province of Congress to declare a stream to be navigable which is not so in fact, and, besides, that the records of the War Department have always shown, so far as his department can find, that the Arkansas is not capable of being navigated above Grand River; that it ap-

pears doubtful from the reports of the War Department engineers whether the section above Grand River could be made practically navigable by the expenditure of any sum of money, and that even if it could be thus made navigable, that possibility does not constitute navigability with respect to Federal jurisdiction over navigable waters or the ownership of river beds, but that on the contrary, the rule established by many decisions of the Supreme Court is that in order to hold a stream navigable it must be navigable in fact, which depends upon whether in its natural condition it affords a channel for the use of commerce of a substantial and permanent character. He also says that in the case of *Kansas* v. *Colorado*, 206 U. S. 46, 86, the Government intervened and relied mainly upon the records of the War Department and took the position that the Arkansas River is not now and never was practically navigable beyond Fort Gibson (on the Grand River) in the Indian Territory, and that the engineers of the War Department assisted the Department of Justice to maintain its position in that case.

"2. In view of these considerations the Acting Attorney General says there appears to be no controlling necessity for the Secretary of War to maintain a decided stand in this matter. 'A passive attitude on his part,' he says, 'would relieve this department of present embarrassment 'and leave the War Department free to exercise its full jurisdiction in any possible future event.' But his idea of passivity is sufficiently indicated by his suggestion to the President that the department take the following affirmative action:

"(1) Recall the letter of October 11th, 1911, in which the department expressed the view that this particular reach of the river is navigable and substitute therefor a statement that the records of the department show the head of navigation on the Arkansas to be at the mouth of the Grand River. This, he says, is simply to be a statement of fact.

"(2) Failing this, might not the Secretary detail some competent official of the engineering bureau to make an examination of the records and testify concerning them?

"(3) Might not the Secretary, in any event, detail one or more engineers experienced in work on navigable waters and well acquainted with the Arkansas, to make examinations as to present conditions and as to certain physical features not sufficiently covered by former examinations for the purpose of these cases, and testify as to the results? He then adds that as he understands the Secretary of War's letter, the Secretary does not object to the employment of his experts if they are not called upon to explain the policy and the opinion of his department on the question at issue.

"(3) Of course, the sole interest of the Secretary of War is to guard these matters committed to his care. That the Government has jurisdiction over the stream flow in the non-navigable reaches of a navigable stream, so far as is necessary to protect the navigable portion below is true (Rio Grande case), but, however viewed, that would not justify the department, in aiding in the establishment of what it believes to be an erroneous finding, hurtful to Federal jurisdiction. It ought not to help to put the label of non-navigability on a waterway which appears to the department to be clearly navigable. The jurisdiction in the two cases is not of the same character. Jurisdiction over non-navigable reaches is not a jurisdiction operating directly upon navigation—full, affirmative and complete—it is rather an incidental jurisdiction conferring the police function of preventing whatever would endanger the flow in the navigable portions further down. Such jurisdiction is distinguishable from the affirmative function of government to foster and promote commerce and therefore to improve and develop the facilities and extend the limits for navigation. On the physical facts, however, the engineer department does not find that 'the present case of the Arkansas is exactly parallel in this respect to the case of the Rio Grande,' but rather that the Arkansas in this reach has a natural channel

for commerce capable of use, and that any barriers or obstructions that may be found to render navigation somewhat difficult are such as would yield to artificial aid and improvement. The fact that such aids need be resorted to, or that the stream is not navigable at every point, does not destroy the quality of navigability. *St. Anthony's Falls Water Power Co.* v. *St. Paul Commissioners*, 168 U. S. 349, 359, *The Montello*, 20 Wall. 430. *Kansas* v. *Colorado* did not involve the question of navigability of the Arkansas in Kansas. The Department of Justice placed its ground of intervention, not upon the theory of navigability, but upon a 'New Nationalism' doctrine of 'a supposed superior right on the part of the National Government to control the whole system of the reclamation of arid lands.' In that case the Department of Justice asserted that 'the Arkansas River is not now and never was practically navigable beyond Fort Gibson,' but the Chief of Engineers informs me that he finds no office record to show that this department aided in the assertion of that view. I know of nothing that the department did in that case to conclude it now from following what appears to be a settled department view.

"4. I cannot find that the Supreme Court has in so many words ever held what the Secretary of War in his letter said it had held, that:

> " 'If the Congress has with respect to such a stream treated it as if navigable * * * this is determinative upon the question of fact.'

"On principle I cannot see, however, that it would be otherwise, and the decisions of the Supreme Court as to the absolute power of Congress over the whole subject of navigation fairly indicates the correctness of that view. If navigable rivers are, for commercial purposes, the property of the Nation and subject to all requisite legislation of Congress; if the power of Congress to control, improve and extend the navigability of a stream is a 'great and absolute power'; if all means having some positive relation to the end in view which are not forbidden by some other

clause of the Constitution are admissible; if Congress may make an unlawful structure lawful and a lawful structure unlawful (the element of contract out of the way); it may determine beyond question the quantity of water in a river necessary to navigation, and if the determination of Congress in all these respects leaves no room for judicial inquiry, as is well established, then by analogy Congress cannot be denied the right to regard the reach of this river in question as navigable and proceed to its improvement. If such legislative action is ever judicially reviewable, it must be on the ground that it is purely arbitrary and without reasonable relation to a legitimate end. Can it be said that Congress, having in this respect all the power of the sovereign States prior to the Constitution, cannot make a declaration having higher legal value than mere judicial notice, or an equity court's finding of fact, or the verdict of a jury could possibly have? If not, then the determination of the scope of exercise of one of the greatest National powers must be left to the necessarily varying and conflicting decisions of courts and juries in questions which involving nothing more than individual property rights. Of course, in the absence of such a legislative declaration, or legislative action equivalent thereto, the 'fact' of navigability must be judicially determined. I can find no authority, however, holding that a legislative determination of the fact of navigability of a stream, or a certain section thereof, is not conclusive of judicial inquiry. *Hurst* v. *Dana*, 122 Pac. 1041, and *State* v. *Akers*, 140 Pac. 637 (Kan.), holding that the Arkansas in navigable in Kansas and that the public acts and declarations constitute determinative factors of navigability, are interesting and informative in this connection.

"5. However all this may be, I cannot see how this department can properly do what the Department of Justice wants it to do. If the letter of October 11, 1911, be recalled, a statement of fact cannot be submitted to the effect that 'the records of the department show the head of navigation to be at the mouth of Grand River.' Of course,

nobody could make this statement as a fact unless he believed it to be so, and it is the view of the Chief of Engineers, the immediate custodian of the records and the head of the technical bureau dealing with matters of navigable waters, that the records do not indicate that the head of navigation is at the mouth of Grand River, and a different view seems impossible from what I have seen of the records. The Department of Justice, however, thinks otherwise. However, what the records may or may not show, if that be competent, is not for this department nor the Department of Justice to say, but for a court or jury. The department has already furnished all records requested and will, I assume, furnish any others that may hereafter be requested.

"Of course, the Secretary of War can 'detail some competent official of the engineering bureau to make an examination of the records and testify concerning them,' if that be a competent method, but I should think that the Chief of Engineers or one of his assistants in the office in which the records are, would be the competent witness for that purpose, and I have just indicated the view of the Chief of Engineers, which presumably is something more than a personal view, but the view of his bureau. So also the Secretary of War may 'detail one or more engineers experienced in work on navigable waters and well acquainted with the Arkansas to make examinations as to present conditions and as to certain physical features,' but testimony after such an examination would seem to be of far less value than the testimony of these officers who have been in charge of this very river for a number of years and who have observed the cycle of changes running through a long period of time. The Chief of Engineers has communicated with all such officers who are now accessible and they have notified the Chief of Engineers that from their knowledge of the river they would have to testify that it is navigable. Under all the circumstances, I, like the Chief of Engineers, do not see how the War Department can honestly hold any other view or express any other opinion than that this particular

portion of the Arkansas River is a navigable waterway of the United States.

"6. The Acting Attorney General, in concluding, says, 'As I read his (the Secretary of Wars) letter to you, the Secretary does not object to the employment of his experts if they are not called upon to explain the policy and opinion of his department on the question at issue.' It is apparent to me that the acting Attorney General throughout fails to understand the position of this department, but conceives that that position is based on a mistaken idea of public or departmental policy. This is not the case. It is the settled view of the War Department that the Arkansas River between Fort Gibson and Arkansas City is a navigable waterway of the United States. This is not based upon any ulterior considerations, but it is a sincere conviction resulting from a knowledge and consideration of physical facts reported from time to time and over great number of years by engineers of this department whose duty it is to make such reports. (Signed) "E. H. Crowder,

"Judge Advocate General."

(Transcript 587, 591.)

The controversy between the Attorney General and the Secretary of War reached the state when the Attorney General called in the President in the hope that the Secretary of War might be induced to change his attitude on the subject of the navigability of the river, as the Interior Department had done, but the result of that effort is very well illustrated by the statement of President Wilson in his letter to the Attorney General of October 1, 1915, in which he says:

"Apparently we are up against a stone wall so far as the War Department is concerned."

The "stone wall" referred to by the President was the determination of the War Department to stand by the posi-

tion maintained throughout the history of the Government, that the Arkansas River is a navigable stream.

On August 12, 1915, the Secretary of War wrote the Attorney General as follows on the subject of the navigability of the stream:

"War Department.
"Washington, August 12, 1915.

"The Attorney General.

"Sir—In reply to your letter of August 6, 1915, requesting the detail of Major A. B. Putnam, Corps of Engineers, and Mr. P. R. Van Frank, Jr., to take stream measurements in the Arkansas River, I have the honor to inform you that your request has received the very careful consideration of the Chief of Engineers as well as of myself.

"The Chief of Engineers expresses his view on the matter in part as follows:

"Major Putnam has recently died, and his detail cannot therefore be considered. Mr. Van Frank could undoubtedly determine with reasonable accuracy the value of flow of the rivers as requested by the Attorney General, but the date which would thus be obtained would be so meager that it could in no event have any practical bearing upon the question. It might happen that the river was in an exceedingly low stage, a medium stage, or a very high stage on the date mentioned. To obtain information of any value whatever as to the flow of a river, the observation should be extended over a period of years, not of days. If such testimony as is proposed by the Attorney General should be given by a representative of the Engineer Department, it would be so subject to attack by the opposing parties as to make it dangerous, and any man who posed as an expert and based any conclusions upon such insufficient data could be made to appear so ridiculous that the effect could

only be detrimental to the side of the case for which he appeared.

"I strongly recommend that the detail of any officer or employee of the Engineer Department for the purpose of taking stream measurements of the Arkansas River to be used in the case to be tried in September, *proximo*, be not made.

"79270/& E. D.

"I concur in the views of the Chief of Engineers and, therefore, regret that I am unable to accede to your request.

"The confidential memorandum enclosed with your letter is returned herewith.

"Very respectfully,

"Lindley M. Garrison,
"Secretary of War.

(Trans. 597-601)
"79270/7 E. D.
"79270/8 E. D. Accomp'g."

On August 26, 1915, the Secretary of War wrote to the President on the subject as follows:

"War Department,
"Washington, August 25, 1915.

"My Dear Mr. President:

"I have yours of August 25, concerning the suit respecting the oil rights of the Osage Indians.

"The Attorney General has evidently misapprehended the position of this department. That position is as follows:

"To the extent that the Federal Government has jurisdiction over interstate navigable streams, the administrative exercise thereof is vested in the War Department. Broadly speaking, the Supreme Court of the United States has held upon this question that navigability, or that which affects navigation, is a question of fact depending upon numerous considerations. If the Congress has, with respect

to such a stream, treated it as if navigable, the Supreme Court has held that this is determinative upon the question of fact. The question is one of supreme importance; if the feeders of the Mississippi River were blocked off from flowing into it, the navigability of the Mississippi River would be impaired, if not entirely destroyed. It is, therefore, vital to the Federal Government with respect to this question of navigability to maintain to the utmost point of reason the jurisdiction of the Federal Government over everything which affects the navigability of interstate streams. The mere fact that at a particular point or points in a stream no boat of commerce could float is not and never has been held to be determinative of this question. Of course, if there be sufficient water to float boats of commerce, that fact is determinative, but the converse is not true, and very often the sole purpose of an act of Congress is to produce navigability where none before existed. It is, therefore, largely a question of potentiality, rather than of existing conditions. With respect to the specific stream in question, at the specific point in question, this department in a memorandum made out for the Department of Justice, dated September 16, 1914, set forth various and numerous instances where the Congress specifically treated this portion of the stream as navigable by appropriations of money and provisions for the doing of Government work therein. If, in the suit in question, the War Department could with propriety be heard, it would be its duty to urge by every legitimate means upon the court the imperative necessity of deciding the navigability of this stream at the place in question. This duty would arise because of the principle involved and the numerous instances of a similar character depending upon the establishment of that principle. If, in the specific case, it should be decided that a stretch of water of this character, which Congress had treated as navigable by the appropriation of money and the ordering of work therein, was not in fact navigable, such a decision would practically undermine and destroy the essential foundations upon which the custody

of navigable streams depends. If the Federal Government has not the power and jurisdiction to control the flow of water which is essential to the navigability of navigable stream, then its apparent jurisdiction over navigable streams is not real. If the purpose of the suit in question is to obtain a decision that the title to the bed of this river is vested in certain citizens or others who have the rights, by reason of ownership, of impeding the flow of the stream by excluding the Federal Government from interfering with the bed of the stream, then it has for its purpose a determination which would overflow the existing basis of Federal jurisdiction on this whole subject matter.

"In an interview which I had with the Attorney General I took the liberty of pointing out to him that I felt that he had an initial duty before determining the scope, methods and proof of the case on behalf of the Osage Indians—if they are the particular parties in interest. I stated to him, as I have already briefly stated to you, the underlying principle involved in the subject matter. I said that if the United States Government was a party to this suit, it would become his duty, as Attorney General, to determine what the proper legal position of the Government should be under all the circumstances, and then to maintain it. I did not think, and so told him, that the fact that the wards of the Nation were parties, instead of the Nation itself, made any difference in his duty in this respect. If the Interior Department were, in its own behalf, claiming title to the bed of this stream, as an incident to which it claimed the right to dam it up, or divert it, or do whatever one has a right to do with non-navigable water, and if the War Department, as the custodian of the navigable streams, were contending as it would, that under all the circumstances this was a navigable stream, and has been so treated by Congress and should have to be so treated by the Government, then it would become the duty of the Attorney General to determine which was the correct view of the law. That is what I still think about the suit. I do not think that the Attorney

General should maintain in this suit that the stream which has been treated as this one has been by Congress, should be declared to be a non-navigable stream. If he does so contend, and obtains a decision in accordance with his contention, a most grievious injury will ensue to the Nation.

"I hope I have made it sufficiently clear in the above why I did not feel it possible for the War Department to furnish witnesses to the Government in this suit. If one or more engineers of the department were to go to this portion of the river and make measurements and testify with respect thereto, they would only be doing what any other engineer is equally competent to do. If they go for any other purpose they are without proper authority to testify In other words, they cannot go and properly testify that this is, in the judgment of the War Department, a non-navigable stream. They could not give any other reasons than those which this department has already given or stands prepared to give. It would be putting the War Department in a totally false position, one which I feel it has no right whatever to occupy, to order engineer officers to go and testify at this trial as to any other thing than physical facts, and their testimony is of no more value than that of other observers of physical facts. To the extent that their presence would reflect the judgment of the War Department, in view of the conditions produced by legislative action, their testimony would be illusory, because they would have no right to speak on behalf of the department in those respects.

"I am sure that you will realize that you were mistaken in believing that I had declined to assist the Government, or that I had not given the reasons which led to the conclusion that we had reached. I am very desirous in this, as in all other cases, of the fullest co-operation, but I cannot, as at present advised, act with another department of the Gov-

ernment to destroy or impair one of the most important trusts confided to my jurisdiction.

"Sincerely yours,

"Lindley M. Garrison,

"Secretary of War.

"The President" (Trans. 702-10).

September 30, 1915, the Secretary of War wrote the President as follows:

"War Department,

"Washington, September 30, 1915.

"My Dear Mr. President:

"On the 7th of September you transmitted to me a letter from the acting Attorney General (Solicitor General Davis) about the navigability of the Arkansas River above the Grand River, and stated in your letter to me that what the Department of Justice requested did not seem to you to militate at all against the objection of my department as set forth in my letter to you. You requested a reconsideration of the matter.

"I have given the matter careful consideration and have caused it to be restudied by the Chief of Engineers and by the Judge Advocate General. I herewith enclose to you copies of the reports made to me by the Chief of Engineers and by the Judge Advocate General after such careful restudy of the whole matter.

"It seems to me that these reports made perfectly clear the position which I had endeavored to make clear in my previous communications to the Department of Justice in this matter.

"In the opinion of this department, based upon the facts known to this department and the records of this department, we can only testify, if called upon to do so, that this

portion of the Arkansas River is navigable. This being so, I cannot perceive any way in which we can properly aid the Department of Justice in any endeavor to prove that this portion of the river is not navigable.

"I need not assure you or the Department of Justice that the postion which I have taken in this matter is not arbitrary, is not based upon any desire to sustain a position previously taken if upon re-study or re-examination such position was not properly based, and that if I could consistently do what the Department of Justice wants me to do, I would gladly do so."

"What the Department of Justice asks me to do is to detail engineers from the Corps of Engineers who will be competent to testify concerning the navigability of the Arkansas River at the *locus in quo*. As will be seen from the very careful review of the Chief of Engineers, every such officer, possessed of competency by reason of knowledge, is honestly convinced that the portion of the river in question is navigable, and if detailed for the purpose of acting as a witness would be compelled by his conscience to testify to that belief. Of course, I shall immediately comply with your suggestion of detailing officers of the Engineer Corps to act as witnesses in this case if under all the circumstances the Attorney General determines that he desires to produce such testimony as they will be required to give.

"Sincerely yours,

"Lindley M. Garrison.

"The President.
"Inclosures." (Tran. 717-8)

After Mr. Secretary Garrison had left the Cabinet and had been succeeded by Mr. Secretary Baker, the Attorney General's office wrote to Secretary Baker, calling his attention to the letter of October 11, 1911, by the Acting Secretary of War, declaring the view of the War Department

that the Arkansas River along the Osage Reservation was a navigable stream, and requesting Mr. Secretary Baker to recall that declaration. Two letters were written by Secretary Baker November 24th, 1916, about eight months after the trial of this case was closed in the court below. The first of these letters is as follows:

"War Department,
"November 24, 1916.

"My Dear Mr. Attorney General:

"In the accompanying letter I have expressed it as my judgment that the records of this department show that the head of navigation on the Arkansas River is at the mouth of the Grand. I have not undertaken, however, to revoke the letter of this department of October 11, 1911, signed by Assistant Acting Secretary Oliver, since I believe that that course would be less orderly and less advisable from an administrative standpoint.

"Cordially yours,
"Newton D. Baker,
(Trans. 728) "Secretary of War."

The other letter is as follows:

"War Department.
"November 24, 1916.

"Attorney General:

"Sir:—In response to your letter of the 20th I have the honor to state that in my judgment the records of this department show that the head of navigation on the Arkansas River is at the mouth of the Grand River, and that the Arkansas River is non-navigable in fact above that point.

"Respectfully,
"Newton D. Baker,
(Trans. 727) "Secretary of War."

The appellants in the court below protested against the consideration of the last two letters for the following reason:

This case has been submitted for many months and has been under consideration by the court for many months prior to the 28th day of November 1916; that said letters and each of them were self-serving declarations; that the said letters were written by the Honorable Newton D. Baker, Secretary of War, to the Attorney General before the Secretary of War had been in office a sufficient length of time to acquaint himself with what the records of the War Department show to be the head of navigation on the Arkansas River, or as to whether the Arkansas River is navigable in fact above the mouth of the Grand; that the letters were incompetent, irrelevant and immaterial (Transcript 742).

We submit that these two puny little letters from the then new Secretary of War, the Honorable Newton D. Baker, are insufficient to overcome the strong and forceful declaration by the Judge Advocate General of the Army, the Chief of Engineers of the War Department and the then Secretary of War shown in the foregoing correspondence that within the purview of the various acts of Congress the Arkansas River along the border of the Osage Reservation is a navigable stream and that the War Department has always treated the Arkansas as a nvigable stream.

THE TEST OF NAVIGABILITY

There are three tests of navigability, depending in their application on the character of the stream or water under consideration. These tests are:

First. Actual navigability, such as is possessed by the seas and the great rivers of the country, like the Mississippi River, and is referred to in the decision; and the text books as "navigability in fact."

Second. The tidal test, under which all waters in which the tide ebbs and flows are held to be navigable waters. They include rivers, bays and inlets, or arms of the sea, and the water is universally held to be navigable below what is known as high-water mark, whether it be navigable in fact or not.

Samson v. *Spotswood*, 82 Ala. 163,
Farnham on Waters, Chapters 40 to 46.

Third. The legal test, including those streams or waters which possess potential navigability, but which have by legislation, State and National, been declared to be navigable streams of the country, like Snake River, the Wabash, the Arkansas, where the character of the navigability has been impressed upon them throughout their reaches by the legislation.

As to the first class of navigable waters, but little may be said. They are in fact navigable, so that no controversy could arise as to the ownership of the beds under such waters.

As to the second class, but little controversy can arise. *Under the tidal test*, the water is regarded as navigable up to the high-water mark, whether it be navigable in fact or not. But up to the high-water mark no dispute is permissible on the question as to whether or not the water in which the tide ebbs and flows is navigable. This proposition is very well illustrated by the facts in the case of *Martin* v. *Waddell*, 16 Peters, 367, 10 L. Ed. 997. That case was an injectment suit for 110 acres of land covered with water in Raritan Bay in the Township of Perth Amboy

in the State of New Jersey, over which the tide ebbed and flowed. The fact that the tide ebbed and flowed over the land was accepted as conclusive evidence of its navigability, and hence there the title was in the State of New Jersey, notwithstanding the fact that the water itself was nothing more than a "mud flat." Mr. Justice Thompson, at page 1610, 10 L. Ed., says:

> "The premises in controversy in this case was a 'mud flat,' covered by the waters of the Bay of Amboy in the State of New Jersey."

But, as above stated, the mere fact that this "mud flat," though incapable of sustaining any character of navigation, was below the high-water mark and within the ebb and flow of the tide in the bay, was accepted as conclusive evidence that the premises were under navigable waters.

The same principle is illustrated by the facts in the case of *Pollard* v. *Hagan*, 3 Howard 212, 11 L. Ed. 665. This was also an injectment suit in which the plaintiff alleged that the land in controversy was "bounded on the north by the south boundary of what was originally designated as John Forbes Canal, on the west by a lot now or lately in the occupancy and claimed by Ezell, on the east by the channel of the river, and on the west by the Government stream." The plaintiff read in evidence patent from the United States to the lot in question and an act of Congress passed in 1836 confirming the plaintiff's title to the premises mentioned in the patent, and it was admitted that the patent covered the premises in controversy. The defendants, to maintain their defense, introduced a witness to prove that the premises in controversy were covered by the waters of Mobile Bay at common high tide, to which

evidence the plaintiff objected, but the objection was overruled. The defendants further offered to prove that the water at high tide flowed over the premises and continued to flow over the premises up to a certain date, all of which evidence was objected to by the plaintiff, and the objection overruled. The court charged the jury that if they believed the premises sued for were below the usual high-water mark at the time Alabama was admitted into the Union, then the act of Congress and the patent in pursuance thereof could give the plaintiff no title, whether the waters had receded by the labors of man only or by alluvium. The jury found in favor of the defendants; that is, that the premises were below the usual high-water mark along the Mobile River. The contention of the defendant in that case was sustained by the State Supreme Court and by the United States Supreme Court. The only evidence of navigability offered was that the premises in controversy were located below high-water mark and within the ebb and flow of the tide in Mobile Bay. There was no evidence offered, nor was it contended, that over the *locus in quo* in that case navigation of any kind was carried on or that the water was capable of sustaining navigation at that point. On the contrary, it appeared that the water had been caused to recede by the filling in of the land by the hand of man, but notwithstanding this fact the court accepted as conclusive evidence of navigability the fact that the land was below the high-water mark and within the ebb and flow of the tide.

On the coast of the United States from Main to Mexico, and from Southern California to Oregon, there is but a small percentage of the territory where actual navigation could be carried on over the entire space covered by the ebb and flow of the tide and up to the high-water mark.

There are literally thousands of miles of coast such as this where for distances ranging from a few feet to several thousand feet, being the space between high and low tide, no actual navigation could be conducted, and yet the water covering these thousands of miles of territory are conclusively regarded as navigable waters. It may be stated as generally true that between the high and low water-mark along the coast, the space being covered by the ebb and flow of the tide, is not navigable for practical purposes. This is literally true except where the water is deep enough to constitute a harbour, but all these non-navigable spaces, or rather stretches, where actual navigation is impossible, are conclusively treated as navigable waters and the soils under them belong to the States and are subject to disposition by the States. This may be called fictitious navigability, or theoretical navigability, yet for all purposes the waters covering these stretches along the coast are regarded as navigable to the same extent as the waters of the largest rivers and of the deepest parts of the sea.

The third or *legal test* is just as well established in the political and judicial history of the country as the other two tests of navigability. It has special application to those larger rivers of the West which traverse a number of States and whose banks are wide apart and which carry a large amount of water scattered over broad and shallow beds of sand.

We believe the correct rule is that where the United States asserts its sovereignty and jurisdiction over a stream running through a Territory which is subsequently embraced within a State, and through its executive legislative departments, treats the stream as navigable, and

the State, after its admission, likewise treats the stream as navigable, that a distinct character and quality is thus impressed upon the stream to such an extent that the judicial department in the rendition of judgments based on the proceedings and evidence in particular cases, where either sovereign asserts the navigability of the stream is without power to deny its navigability, and that in such cases navigability is a matter of law.

In the case of *In re Horicon Drainage District,* appeal of Rottenberg, 136 Wis. 227, 116 N. W. 12, the Supreme Court of Wisconsin said:

> "The fourth assignment of error, to the effect that the court erred in finding that no part of Rock River is in fact navigable, is the important question on this appeal. That Rock River is a navigable stream in so far as the question of navigability is here concerned, must be regarded as settled by legislation, State and National, and the decisions of this court. Ordinance of 1787, Art. 5; Loc. Acts. Wis. 1839, p. 99, No. 49, Section 4; Section 1607, St. 1898; *Wood* v. *Hustis,* 177 Wis. 429; *Willow River Club* v. *Wade,* 100 Wis. 111, 76 N. W. 273, 43 L. R. A. 305; *Smith et al.* v. *Youmans et al.,* 96 Wis. 103, 70 N. W. 1115, 37 L. R. A. 285, 65 Am. St. Rep. 30; *Pewaukee* v. *Savoy* et al., 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 836, 74 Am. St. Rep. 859; *Rossmiller* v. *State,* 114 Wis. 169, 69 N. W. 839, 58 L. R. A. 93, 91 Am. St. Rep. 910; *Diana S. Club* v. *Lamorenx,* 114 Wis. 54, 89, N. W. 880; 91 Am. St. Rep. 898; *In re Dancy Drainage District,* 129 Wis. 129, 108 N. W. 202. It is established that Rock River was meandered by the United States Government surveys as far north as the north line of township 11 north, range 16 east, and by our Statute (Section 1607) declared navigable up to township 14, Range 15, but it is argued that the local acts of Wisconsin of 1839,

before referred to, do not declare Rock River navigable, but provide: 'The Rock River is hereby declared to be a public highway and forever free for the passage of boats, barges, canoes, rafts or other crafts capable of navigating said river as high up said river as township 14, range 15.' This is a declaration that the river is navigable, and so held by this court in *Wood* v. *Hustis*, 17 Wis. 429. Considerable stress is placed on *State* v. *Carpenter*, 68 Wis. 165, 31 N. W. 730, 60 Am. Rep. 848, but that case recognizes the navigability of Rock River under the Ordinance of 1787, the Constitution and many laws of the State, and says: 'This court is bound to take judicial knowledge that it is a navigable stream and public river of this State; and that it is unlawful to obstruct it there can be no question. The public and all persons have the right to its free and unobstructed use for the purposes of navigation at all times and under all circumstances.' There is in the opinion, however, other language tending to convey the idea that, although the river has been at an early date navigable in fact, it has ceased at the point in question to be practically navigable. When, however, the opinion is confined to the facts in the case, it will be found inapplicable here. We do not regard it necessary to go into the question of whether Rock River is in fact navigable. It was declared navigable by legislative authority; therefore must be treated as one of the navigable streams of the State in carrying out the provisions of the drainage law. The policy of the Legislature of this State has been to preserve navigable waters of the State from impairment, and this court has held it the duty of the Legislature to do so. *In re Horicon Drainage District*, 129 Wis. 42, 108 N. W. 198, and cases cited. So in view of the history of legislation upon the subject, we think it plain that all waters declared navigable by act of the Legislature must be regarded navigable waters of the State, and not sub-

ject to impairment under the drainage laws, at least in the absence of express authority conferred upon the drainage commissioners, if, indeed, the Legislature has power to confer authority to impair navigable waters or the common law incidents of navigation. The policy of this court, as shown by a long line of decisions, has been to scrupulously protect the navigable waters of the State from impairment. *Neepee-nauk Club* v. *Wilson et al.*, 96 Wis. 290, 71 N. W. 661; *Willow River Club* v. *Wade*, 100 Wis. 111, 76 N. W. 273, 42 L. R. A. 305; *Mendota Club* v. *Anderson et al.*, 101 Wis. 479, 78 N. W. 185; *Pewaukee* v. *Savoy et al.*, 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 836, 74 Am. St. Rep. 859; *Rosmiller* v. *State*, 114 Wis. 169, 89 N. W. 839, 58 L. R. A. 93, 91 Am. St. Rep. 910. If it were necessary to go into the question whether Rock River is in fact navigable, we think it would be difficult to sustain the finding of the court below to the effect that it is not upon the facts established and the repeated decisions of this court. But we shall not review the evidence or consider that question, since we are of the opinion that Rock River is navigable in law.

"Having determined that Rock River is navigable, the next question is, does the drainage law authorize its impairment? The power conferred upon drainage commissioners under Section 1379, 22 St. 1898, was the same as the power given them under Section 18, c. 419, p. 704, Laws 1905. And it will be seen that no authority is conferred upon them to appropriate or impair navigable waters under such law."

In *Wood* v. *Hustis*, 21 Wis. 429, which was an action for damages, the complaint alleged that the river at a certain point was navigable in fact, and was meandered and returned as navigable by the surveyors of the United States. The answer denied that the river was navigable at the point in controversy, and on trial the defendant offered evidence to show that it was not navigable at that

oint. This evidence was rejected, and the Supreme ourt approved the holding, and said:

"In 1839 Rock River was declared to be a public highway to a point above the one in question. This is plainly equivalent to declaring it a navigable stream, and by repeated acts of legislation it has since been recognized as such. When the Legislature, therefore, in the mill-dam law, used the words 'not navigable,' they used them not in the common law sense as including all rivers where the tide does not ebb and flow, but in the sense in which they have long been used in this country, as including only such as were not navigable in fact for any of the useful purposes of commerce, or such as had not been declared to be navigable or public highways by the law itself. It will be observed that there is no question here as to the effect of an act of the Legislature declaring a stream navigable, which is not so in fact, as against the rights of the owners of the land over which it passes. It is simply a question as to what the Legislature means by the word 'navigable.' And whence by one law they had declared a stream to be a public highway, thus necessarily implying that it is navigable, and then they pass another law in respect to streams 'not navigable,' it is impossible to suppose they intended to include the former. We should then be of the opinion that the court properly rejected the inquiry whether the stream was navigable in fact, as a means of determining whether the mill dam law was applicable, for the reason that it was bound to assume it was not applicable to a stream which the Legislature had previously declared to be a public highway."

See to the same effect, *State* v. *Wabash Paper Comy*, 22 Ind. Appellate Court Reports 167, 51 N. E., e —.

In case of *State* v. *Dibble*, 49 N. C. 107, it is said:

"The Legislature having by various acts declared the Neuse River, between certain points, a navigable stream, it is a nuisance to hold a bridge across the same between these points, so as to prevent the passage of boats; and such nuisance may be abated by anyone.

"There is no authority given by the Legislature to county courts to build bridges over navigable streams, without making draws so as to admit the passage of boats and other craft navigating such stream."

In the body of the opinion, beginning on page 110, it is said:

"Whether the River Neuse, between the port of Newbern, in Craven County, and the town of Smithfield, in Johnston County, which is stated to be navigable for eight months in the year, for flat-boats and small steamboats, comes within the terms of this rule, or whether the rule can be extended by analogy to embrace it, we need not inquire. The Legislature has the undoubted right to declare it to be a navigable stream, and, we think, that has been done, either directly or inferentially, by the following acts. First, the act of 1812 (ch. 849 of the Rev. Laws 1820), entitled, an act for the opening and improving the navigation of the Neuse River, created a company for that purpose, and in the fourth section gave it power to 'construct for the opening and improving, or otherwise cause to be opened and improved, the navigation of the Neuse River, from the present head of boat navigation therein below Lockhart's Falls, westward to Crabtree Falls,' etc. Secondly: By the fifth section of the 103 chapter of the revised statutes, taken from the acts of 1823, (ch. 1197 of Taylor's Rev.), the justices of the several county courts of Johnston, Rayne, Lenoir and Craven were authorized to lay off the in-

habitants on both sides of the River Neuse, above Spring Garden, into convenient districts, with the view of removing 'all brush and other obstructions to the navigation' of that river. Thirdly: The act of 1848, Chap. 82, Sec. 51, appropriating forty thousand dollars 'for the purpose of cleaning out and improving the navigation of the River Neuse, between the town of Newbern and the town of Smithfield.' Fourthly and lastly: The act of 1850, Chap. 112, after revising the appropriation made in the preceding act of 1848, creating the company styled the 'Neuse River Navigation Company,' for the more full and complete accomplishment of the object of affecting a more certain navigation of the River Neuse between the town of Newbern and the County of Craven, and Watson's Landing, above Smithfield, in the County of Johnson.

"The Neuse River having been thus recognized as a navigable water, the defendants had the right, in common with all other citizens, to navigate it with their boats, and, as incident to such right, to remove all obstructions not put there by or under the sovereign power. It is admitted that the sovereign power in the present case is the General Assembly of the State. It would have been the General Assembly had the Congress of the United States passed any act relating to the River Neuse in execution of the power to 'regulate commerce with foreign nations, and among the several states.' Con. of U. S., Act 1, Sec. 8; *Wilson* v. *Black Bird Creek Marsh Company*, 2 Peters 248, 8 Curtis 105."

At page 27, Vol. 14, Enc. of Evidence, the following occurs:

"STATUTORY DECLARATION OF NAVIGABILITY: (1) In general. Navigability may be established by showing that by express statutory enactment the stream was declared navigable."

In the case of *The State* v. *Wabash Paper Company*, 22 Ind. Appellate Court Rep. 167, 51 N. E. 949, it is held:

"A navigable river is a public highway. Act of Congress March 26, 1804, paragraph 6 (2 Stat. 279), provides that all navigable rivers within the Indian Territory shall be deemed and remain public highways. Newspapers and other evidence show that the Wabash River was navigable in 1817 for some 450 miles from its mouth. The Legislature, by its acts, has recognized that said river is navigable in its course through Wabash and Miami Counties. *Held*, sufficient to show that the Wabash River is a navigable stream, and hence a public highway for 450 miles from its mouth.

"Judicial notice will be taken that the Wabash and Miami Counties are less than 400 miles from the mouth of the Wabash River, and that certain cities and towns in said counties are situated on the banks of said river.

"Evidence under indictment of committing a nuisance in a 'public place' is sufficient where it shows pollution of a navigable river, which is a public highway, and as a public highway is *prima facie* a 'public place.'"

The case of *The United States* v. *Union Bridge Company*, 143 Fed. 377, is an interesting one in support of our contention that navigable character and quality may be impressed upon a stream by legislation. The first paragraph of this opinion reads as follows:

"The Allegheny River is a navigable waterway subject to the jurisdiction of the United States, having been declared a navigable stream by the Legislature of Pennsylvania and New York in 1798 and 1807, respectively, and included in the plans and covered by appropriations of the National Government for the improvement of interstate waterways and of the harbor of Pittsburg for many years."

The case of *Donnelly* v. *United States*, 220 U. S. 243, 57 L. Ed. 820, supports our contention that a stream may be navigable as a matter of law and that rights in the bed of said stream depend upon the recognition of it by legislation as a navigable stream. In that case defendant Donnelly was indicted on a charge of murder in the United States Court for the Northern District of California. He was convicted and prosecuted a writ of error in the United States Supreme Court. The chief question involved in that Court was whether the offense was committed at a place within the exclusive jurisdiction of the United States, within the meaning of Sections 2145 and 2339 of Revised Statutes of the United States, which provides in substance that every person who commits murder within any fort, arsenal, dock yards, magazine or other place or district of country under the exclusive jurisdiction of the United States, shall suffer death. The indictment charged the defendant Donnelly with the murder of one Chickasaw, an Indian, within the limits of the Indian Reservation, known as the Hoopa Valley Reservation in the county of Humboldt in the State and Northern District of California. The evidence tended to show that Chickasaw, who was an Indian and member of the Klamath tribe, was shot through the body and mortally wounded while he was in or near the edge of the water of the Klamath River, at a place within the exterior limits of the reservation. The trial proceeded upon the theory that the crime was committed within the river bed and below the ordinary high-water mark. It was contended that the United States Court was without jurisdiction because the place of the commission of the alleged offense was not within the limits of the extention of the Hoopa Valley Reservation, but was upon the Klamath river bed, which was alleged by the defendant to be the property of the State of

California, and therefore outside the limits of the reservation. This contention was overruled below, but was renewed in the Supreme Court of the United States.

The jurisdiction of the court depended upon the question as to whether the bed of the Klamath river was a part of the Indian reservation, and that question in turn depended upon the question of the ownership of the bed of the Klamath river. The doctrine established in the cases cited by us as to ownership by old and new states of the beds of navigable rivers was fully recognized in the case and it was affirmatively held that California, being admitted into the Union on equal footing with the original states, became the owner by virtue of its municipal sovereignty, of the bed of navigable streams within the state. The question was as to whether, under the law, Klamath river was to be regarded as a navigable stream. If it was a navigable stream under the law, and hence the title to the bed of the stream was in the state, the Federal court had no jurisdiction. The court held that although the stream may be navigable in fact, yet, since under certain statutes of the State of California Klamath River was treated as a non-navigable stream, the effect of these statutes was to destroy the State's title to the bed of the stream, and that, therefore, the Federal Court had jurisdiction to execute the defendant Donnally on conviction for murder. The court said:

> "It is insisted that the Klamath is a navigable river; and there is evidence in the record tending to show that the stream is navigable in fact, at certain seasons, from Requa (near its mouth) up to and above the *locus in quo*. But in the view we take of the present case the question of its navigability in fact, or in law, is immaterial except as it bears upon the title of the United States to the bed of the stream. The present question is whether that bed was a part

of the Indian reservation, and that depends upon the question of ownership."

After citing many of the cases relied upon by us in this brief to show state ownership in the beds of navigable streams, the court said:

"But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property, is for the determination of the several states. Thus the State of California, if she sees fit, may confer upon the riparian owners the title to the bed of any navigable stream within her borders.

"Now, a California statute of April 23, 1880, Chap. 122, declared the Klamath river to be navigable from its mouth to the town of Orleans Bur, which is above the *locus in quo*. But this was repealed by Act of February 24, 1891, Chap. 14; and by an Act of March 11, 1891, Chap. 92 (Political Code, 2349), an enumeration was made of all the navigable rivers of the state. This was held by the Supreme Court of that State to be exclusive, so that no other rivers are navigable under the laws of California. *Cardwell* v. *Sacramento County*, 79 Cal. 347, 349, 21 Pac. 763. The Klamath river is not among those thus enumerated, and it must therefore be treated as not navigable in law. And it will be observed that it was thus placed in the category of non-navigable streams prior to President Harrison's order of October 16, 1891, by which the extension of the Hoopa Valley Reservation was established.

"In the important case of *Lux* v. *Haggin* (1886) 69 Cal. 255, 335, 10 Pac. 674, the Supreme Court of California, after pointing out that upon the admission of that state into the Union 'upon an equal footing' with the original thirteen states she became seized of all the rights of sovereignty, jurisdiction

and eminent domain which those states possessed, and that under No. 3 of the Act of Admission (9 Stat. at L. 452, Chap. 50) the lands of the United States not reserved or purchased for fortifications, etc., are held as the lands of private persons, with the exception that the state cannot interfere with the primary disposal of them nor tax them, and that the navigable waters are common highways, free to the inhabitants of the state and to citizens of the United States, proceeded to declare that whether this act did or did not operate as an immediate transfer of the property in non-navigable rivers to the Federal Government, the legislature of the state, on April 13, 1850, passed an act adopting the common law of England, so far as not repugnant to or inconsistent with the Constitution of the United States or the Constitution or laws of the State of California, as the rule of decision in all courts of the state, and that in view of the subsequent judicial history of the state this act must be held to have operated, at least from the admission of the state into the Union, as a transfer to all riparian proprietors, including in the United States, of the property of the State, if any she had, in the non-navigable streams and the soil beneath them. The authority of this decision was recognized in *Packer* v. *Bird*, 137 U. S. 669, 34 L. Ed. 820, 11 Sup. Ct. Rep. 210. We are not able to find that the doctrine declared in it has since been departed from by the courts of the state.

"It thus appears, from the course of legislation and adjudication by the appropriate authorities of California, not only that the Klamath river has been placed in the category of non-navigable streams, but that the title of the United States to the bed of it where it runs through the public lands has been distinctly recognized. In short, by the acts of legislation mentioned, as construed by the highest court of the state—(a) the Act of 1850, adopting the common law, and thereby transferring to all riparian proprietors (or confirming

to them) the ownership of the non-navigable streams and their beds, and (b) the Acts of February 24 and of March 11, 1891, declaring in effect that the Klamath river is a non-navigable stream—California has vested in the United States, as riparian owner, the title to the bed of the Klamath, if in fact it be a non-navigable river. If in fact it be non-navigable, it is obvious that the same result flows from the mere adoption of the common law.

> "From this it results that whether the river be or be not navigable in fact, the river bed is to be deemed as included within the extension of the Hoopa Valley Reservation."

It thus appears that the Supreme Court recognizes rule or principle that a stream may be navigable in fact, but not navigable in law and cites with approval the case of *Cardwell* v. *Sacramento County*, 79 Calif. 347, 21 Pac. 763, where the California Supreme Court held that:

> "The effect of a series of statutes declaring what streams or portions of streams shall be navigable, which after declaring a stream navigable between certain points, and repeatedly changing one of these points, omits the stream from the list of navigable waters entirely, is to declare by implication that the stream is non-navigable."

Attention is called to the language of the United States Supreme Court to the effect that by the Act of March 11, 1891, declaring the Klamath river to be non-navigable, the State of California vested in the United States as riparian owner the title to the bed of Klamath river, although the river may have been navigable in fact, and that the result of the California legislation was that whether the river be or be not navigable in fact, the title to the river bed vested in the United States and that there-

fore the United States had jurisdiction over the offense. We submit that this is the strongest possible recognition of the doctrine of legal navigability. The court holds that the mere declaration by the Legislature of California that the Klamath river is not a navigable stream vests the title in the United States and confers jurisdiction over the United States to prosecute for murder committed in the bed of the stream, notwithstanding the fact that the river at the *locus in quo* was navigable in fact.

We call the Court's attention to the rule announced in the following cases to the effect that where a stream is meandered by the United States surveyors and the action of the surveyors is approved by the Land Department, the stream is conclusively presumed to be navigable as against persons holding under patents issued pursuant to such surveys to land bordering on streams or lakes. This is a species of legal navigability of the most substantial sort.

In the case of *Board of Park Commissioners* v. *Kimball*, 100 N. W. 927, the Iowa Supreme Court said:

> "But as we view it defendants could not under the record question the character of the river as navigable, for it is conceded that in the original government survey it was meandered, and its character as a navigable stream was thus established so far as the possible limits of the defendants' lots are concerned. The action of the Land Department of the United States Government in meandering the stream and conveying the land bordering on such stream with reference to the meander line is conclusive that the stream was navigable in such sense that the title of the riparian owner resting on such survey extended, under the rule in this state, only to high-water mark. *Rood* v. *Wallace*, 109 Iowa 5, 79 N. W. 449; *Servin* v. *Grefe*, 67 Iowa 196, 25 N. W.

227; *Carr* v. *Moore*, 119 Iowa 152, 93 N. W. 52, 97 Am. St. Rep. 292. That the surveyors, in making the original United States survey, were required to determine the navigability of the stream in determining whether it was to be meandered, is apparent from Act of May 18, 1876, c. 29, 1 Stat. 465, 'providing for the sale of the land of the United States in the territory northwest of the river Ohio and above the mouth of the Kentucky river,' which act was subsequently made the basis for the survey of the land in Iowa. It was therein provided (Section 2) that the land should be surveyed in townships of six miles square by running north and south and east and west lines, unless where, 'the course of navigable rivers may render it impracticable, and in that case this rule must be departed from no further than such particular circumstances require.' U. S. Comp. St., p. 1471, Sec. 2395. And further in the same act (Section 9) it is provided that 'all navigable rivers within the territory to be disposed of by virtue of this act shall be deemed to be and remain public highways; and in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and bed thereof shall become common to both.' 1 Stat. 468, U. S. Com. St., p. 1567, Sec. 2476. In the directions to surveyors issued by the General Land Office it was provided that 'both banks of navigable rivers are to be meandered by taking the courses and distances of their sinuosities.' Lester Land Laws, p. 714. There can be no doubt but that the approval of the survey when made constituted a determination by the Land Department that the stream meandered was a navigable stream, and this determination is conclusive so far as the title of riparian owner is concerned. If defendant have title to any portion of the premises claimed by them west of the line indicated on the plat as their western boundary it must be based on some other ground than that their lots extend by operation of law to the center of the Des Moines river."

In the case of *Carr* v. *Moore*, 119 Iowa 148, 93 N. W. 52, the first paragraph of the syllabus is as follows:

> "Since, under the laws of Iowa, the title derived from the Federal Government to land abutting on meandered waters extends only to high-water mark, the rights of the owners of such land cannot, on the drying up of such waters, be extended beyond the boundaries fixed by the original patents, except by accretion or reliction."

In the body of the opinion it is said:

> "But in this state the title of abutting owners on waters which are meandered is held to extend only to high-water mark, the title of the bed being in the state. *Wood* v. *Railroad Co.*, 60 Iowa 456, 15 N. W. 284; *Serrin* v. *Grefe*, 67 Iowa 196, 25 N. W. 227; *Noyes* v. *Collins*, 92 Iowa 566, 61 N. W. 250, 26 L. R. A. 609, 56 Am. St. Rep. 571. As to whether, under a patent from the United States, the title extends to the center of a stream or lake, or is limited to the margin thereof, is held by the United States Supreme Court to be dependent on the law of the state. *Hardin* v. *Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 35 L. Ed. 428."

It appears from the evidence that Senate Joint Resolution No. 19, approved January 18, 1908, passed by both houses of the legislature of the State of Oklahoma, refers to the Arkansas River as one of the great national highways prepared by nature for internal commerce of the United States and asked Congress to make appropriations for the development of navigation in the Arkansas River (Transcript 678).

According to our view of the law, the government introduced several thousand pages of testimony which is incompetent and irrelevant. It is impracticable in a brief

to undertake to analyze the testimony and separate the competent from the incompetent. This being an equity case, we presume the court will of course disregard the incompetent and irrelevant testimony. Much of the testimony offered by the government may be competent in support of the government's theory that the river is not navigable unless the testimony shows it was capable of sustaining commerce, and should this court sustain that view of the law, the judgment of the court below would have to be affirmed.

We do not believe the testimony in the case shows that the Arkansas River is now practically navigable. We do believe, however, that the testimony shows that the river may be made navigable at the place in controversy. Under our view of the law, it is not necessary for the defendants to show that the river is now capable of being navigated. In the Kansas cases the Supreme Court of that State stated distinctly that the Arkansas River was not capable of being navigated in Kansas, but the court held the river navigable on the theory contended by us here, and the Supreme Court of the United States in the Wear case affirmed the decision.

The issue is sharply drawn between the contentions of the respective sides in this case. If it be held necessary to prove that the Arkansas River is capable of sustaining commerce before it can be held to be navigable, then the judgment of the court below should be sustained; but if, on the other hand, the Court should conclude, as we think it must, that the question of the navigability of the river is one of local law, and that since the Supreme Court of Oklahoma has declared the Arkansas River to be navigable, this Court is bound by the decision. If the Court should hold, as we contend, that navigability is at most a mixed question of law

and fact, and that where the legislative and executive departments of the State and Federal governments have for a long series of years treated the river as navigable, navigability ceases to be a pure question of fact, but becomes a question of law, and the courts are bound by the action of the other departments of the government in treating the river as navigable, then the case should be reversed with instruction to render judgment in favor of appellants.

Respectfully submitted,

GEO. F. SHORT,
Attorney General of Oklahoma,
S. P. FREELING,
W. A. LEDBETTER,
H. L. STUART,
R. R. BELL,
E. P. LEDBETTER,

Counsel for Appellants, Except Arkansas River Bed Oil & Gas Company.